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No. 73 634

In the Supreme Court of the United States

OCTOBER TERM 1973

TRI STATE STORES, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.

Tri-State Stores, Inc., Petitioner

vs.

National Labor Relations Board

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Tri-State Stores, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 16, 1973, enforcing an order of the National Labor Relations Board, hereinafter called the "Board", dated October 1, 1970, under § 10 of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. § 151 *et seq.*)

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp.37-44) is reported at 477 F.2d 204. A timely petition for rehearing was denied on June 18, 1973.

(Appendix A, *infra*, p. 45) The decision and order of the National Labor Relations Board (Appendix B, *infra*, pp. 52,53) are reported at 185 N.L.R.B. 829. The Trial Examiner's Decision is set forth in appendix B, *infra*, pp. 54-79.

JURISDICTION

The judgment of the Court of Appeals is dated and was entered on July 16, 1973. (Appendix A, *infra*, pp. 46-49) This Court has jurisdiction under 28 U.S.C. § 1254(1) and § 10(e) of the National Labor Relations Act, as amended (29 U.S.C. § 160(e)).

QUESTIONS PRESENTED

1. Whether the Court below "misapprehended" or "grossly misapplied" the standards of proof and review:[1] (a) necessary to establish that (1) the employer had knowledge of an employee's protected activity, (2) the employer intended to discharge the employee because of that activity, and (3) the discharge had the effect of discouraging membership in a labor organization, in affirming an alleged Section 8(a)(3) violation of the National Labor Relations Act; (b) in affirming alleged Section 8(a)(1) violations of the National Labor Relations Act concerning an alleged instance of interrogation of an employee, alleged threats of store closure, revocation of union cards, and effectuation of periodic wage revisions and experimental hours changes; and, (c) directing a bargaining order under Section 8(a)(5) of the National Labor Relations Act.

[1]Reference is made to the standards set forth in Sections 10(c) and (e) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 160(c) and (e)) and Sections 556(d) and 706 of the Government Organization and Employees Act (5 U.S.C. Secs. 556(d) and 706) and the interpretations provided by *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951) and *National Labor Relations Board v. Brown Food Store*, 380 U.S. 839 (1965).

2. Whether an interrogation by an employer in which an employee indicates very limited knowledge of union activity and denies signing a union card, otherwise apparently accepted as truthful by the employer, is a sufficient basis for finding a violation of Section 8(a)(1) of the National Labor Relations Act.

3. Whether it is a denial of due process, or an abridgement of the National Labor Relations Act, to find that an employer engaged in an unfair labor practice where the finding was predicated upon conduct of an individual not named in the complaint, where the complaint improperly attributed the alleged illegal conduct to others, and where the complaint at no time was amended nor was any other notice given the employer that it would be held responsible for the conduct of the unnamed individual.

4. Whether union majority status must be unequivocally in existence and either known to the employer or capable of being demonstrated to the employer at that point in time at which the union claims majority status and demands recognition from the employer as a necessary condition to the issuance of a directed bargaining order to the employer.

5. Whether a signed union card, revoked or otherwise disclaimed by the signer, may be included in determining union majority status at the time demand for recognition is made by a union or an employer as an essential element to directing a bargaining order.

STATUTES INVOLVED

The relevant statutory provisions are set forth in Appendix C, *infra*, pp. 82-86. Those provisions are: § 7, § 8(a)(1), (3) and (5), and § 10(c) and (e) of the National Labor Relations Act, as amended. (61 Stat. 136, 73 Stat. 519; 29 U.S.C. §§ 157, 158(a)(1), (3) and (5), and 160(c) and (e)) § 551(6), § 556(d) and § 706 of the Government Organization and Employees Act (80 Stat. 381, 386,393; 5 U.S.C. §§ 551(6), 556(d) and 706) formerly portions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. § 1001 *et seq.*)

STATEMENT OF THE CASE

A. POSSIBLE POLYGRAPH TESTING PROMPTS UNION ORGANIZATIONAL EFFORT.

Petitioner is one of two department stores jointly operated by companion firms. The head office for both corporations is located at the Moscow, Idaho store. The department store involved in these proceedings is located at Moses Lake, Washington.

Polygraph testing of employees at the Moscow store was begun in August, 1969 in an effort to eliminate suspected employee pilfering. While not announced as applicable to the Moses Lake store, rumors of polygraph testing of those employees emerged in late August. (Tr.33,39,345,350-351,

363-364)[2] Employer officials arranged a meeting on August 25 of Moses Lake employees to explain the purpose and method of polygraph testing. Mr. Spear, a professional obtained by Petitioner to administer these tests, and Mrs. Jeane Buchanan, Secretary-Treasurer and Office Manager for both stores (who had taken the test in Moscow) attended. Polygraph testing was discussed at length. Employees were advised that the test was not compulsory, but those who voluntarily took the test would receive a special stipend of $20.00. (Tr.33-35,159,344,349-351,365-366)

After work on September 2 a number of employees held a meeting at the home of non-supervisory employee, Ellen Jones. These employees wanted to discuss, among themselves and apart from management, the polygraph testing prospect. A Teamster's Union representative appeared at this meeting and made a strong appeal for employees to affiliate with the Retail Clerks Union. He stated he would ask a Retail Clerks organizer to be present at another meeting of employees arranged for the following night. (Tr.159,233,236-237,252-253,258,263-264) The following night, September 3, a number of employees again met at Ellen Jones' home. (Tr.159,237,252)

Retail Clerks Union organizer, Mr. Needham, took over the September 3 meeting, attended by 22 employees.[3] After explaining a food labor contract and touting the advantages of his union, he passed out "cards."[4] Aside from the apparent confusion as to the purpose and significance of the

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[2]References designated "A." are to the Appendix to this Petition; those designated "R." are to Volume I "Pleadings" of the record in the court below; "Tr." references are to the transcript of testimony in Volume II of that record; references designated "GCX" or "RX" are to the exhibits of General Counsel or Respondent, respectively.

[3]GCX 2 shows 41 non-supervisory employees on September 15. GCX 8 indicates at least 3 additional such employees were normally employed.

[4]A copy of the "card" is set forth in Appendix D, *infra*, p. 87.

card signing, about 22 employees signed these cards.[5] Union organizer Needham, alleges an additional six cards were received through the mail in the week or ten days that followed.[6] (Tr.135-136)

Shortly before the occurrence of these events, Mr. Lee Connelly, President and General Manager of these companion firms, unexpectedly passed away. He was succeeded by his wife, Doris Connelly, a housewife. Recognizing her shortcomings, she employed a professional management consultant Terri Clevenger. (Tr.123,314-315,343,352-353,356-361,371)

Rumors of some kind of union activity surfaced at the Moses Lake store on September 4. Inconclusive information was conveyed to a Mr. Tout in the Moscow office, who, in turn, advised Mrs. Connelly. She related this information to Mrs. Buchanan that afternoon. (Tr.355-356,367-368) Mrs. Connelly sought out a friend, Bill Jones, also in the department store business, and Miss Clevenger, to meet with

[5]Some employees understood from the union organizer that signing union cards was necessary to obtain an election or a vote. (Tr.387,390-391,395) The organizer told employees that in spite of what cards said, the union would not ask them to become union members until 30 days *after* a labor contract became effective and employees lived under it for 30 days. (Tr.408-409) When put in the perspective of unsophisticated employees, a card that says the reason why others receive less is because they "have not taken the initiative to *belong* to the Retail Clerks Union," while the organizer tells them that they would not have to belong to the union until a labor agreement was negotiated and effective for 30 days, leaves only one clear manifestation to the act of signing a card, i.e., its purpose is solely to get an election. An alleged majority necessary to require a bargaining order, assuming all other elements of an *extensive* unfair labor practice are present, under these circumstances, should not be adequate to support a bargaining order under *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575 (1969) and companion cases.

[6]There is nothing to indicate that Needham ever disclosed the number of cards, or who had signed the cards, to anyone other than General Counsel prior to the Hearing, or that anyone else knew the number, or who signed cards. Employees who attended the September 3 meeting were unsure as to the number who signed cards and none testified that they knew how many cards were signed, or by whom, other than themselves.

the employees to calm them, particularly with respect to the polygraph testing which she believed to be responsible for any employee unrest. (Tr.356-358,360-361)

Jones and Clevenger met briefly with employees, after hours, on September 5. Jones assured them that he was not acquiring the store, attempting to quell a rumor. Clevenger's remarks were brief, as she was ill. She asked employees to introduce themselves and commented that she was there to be helpful. She told them that she would give each employee, who might want to do so, an opportunity to talk to her. She also told the assembled employees that she wanted to discuss advertising, markdowns, etc. (Tr.97-98,166-168)

B. THE DISCHARGE OF ILSE HIFF.

Hiff was employed in the Employer's Moses Lake office on April 2, 1968. She was initially assigned as an office clerk and, 4½ months later, was promoted to be the lead office employee. Hiff reported to Jeane Buchanan in Moscow with respect to certain books, receipts and records. Buchanan was regarded as the Office Manager for both stores. John Ehart was appointed the Moses Lake store manager on the same day that Hiff received her promotion, August 28, 1968. (Tr.158,173,189-192,384-385)

As early as November, 1968, friction developed between Hiff and Ehart. Hiff admits to several incidents of conflict, argument and tactlessness on her part. (Tr.158,171) On August 26, 1969, less than two weeks before Ehart terminated here, Hiff testified the following occurred:

> "* * * I heard from somebody in the store that John [Ehart] or Pat [Banks] or both, would be going to Moscow to talk things over with Mrs. Connelly, so before I went to the bank about 10 o'clock I asked John about it and he said no. I said, 'Well, I think I would like to go to Moscow and talk to Mrs. Connelly myself.' He

said, 'What problems do you have which you couldn't tell me?' I said, 'Well,' and I was sitting at my desk and he walked away from my desk towards his office and got mad, and I told him, 'Well, because you are a puppet on a string.'

"* * * And he turned around and he looked at me and then he walked in his office and closed the door, and then he called me and said, 'Will you come in my office?' I said, 'Certainly.' So I went in and he said, 'O.K., now, what problems do you have?' So I told him that several things were going on and I wished I could talk to Mrs. Connelly, I felt all the money that would be spent on lie detector tests, if periodic raises would be given so the employees would be more satisfied and wouldn't be rebellious, and I mentioned Alto Walters, that I didn't think it was fair to be rehiring her at a dollar sixty, I told him. He said, these are not problems of mine. I said 'Well, O.K.' But my problem was that there was overtime involved and in several cases, even my own, which we were not paid for because, as John Ehart put it, Moscow didn't like us to have too much overtime, so he said to take one extra day off in addition to the regular day off.' And he said, 'Well, that does not concern you, either.' I said, 'Yes, it does.' Then he said, 'You know what, you are trying to run my business and Mrs. Connellys and you know what you are hired for.' I said, 'Yes, John, I know I am office manager and I am supposed to be taking care of my business but I did not mean to say anything out of line. I just wanted to make a suggestion and since I am outspoken I just came out with it.' So, well, we actually finished our talk then and at the moment I can't recall anything else." (Tr.172-173)

Iliff criticized Ehart in other matters as well. Iliff recognized that Ehart was irritated with her interferring with his job, criticizing him, and trying to go over his head. Iliff had no responsibility, at any time, for personnel nor any personnel function. (Tr.173-174)

All her testimony is framed in words that it was her

decision to do thus and so, as an outspoken person, which is evident from the cold record. She told other employees of the foregoing incident and her appraisal of Ehart as a "puppet on a string." However, she was never selected to be an employee spokesman. Her self-serving statement that she "felt they wanted" her to relate things to Ehart is the most favorable evidence that can be mustered to support the unfounded conclusion that Iliff was a grievance spokesman. (Tr.174)

The cold record confirms that Ehart had a timid, a sort of "milquetoast," personality. These personality characteristics were borne out in Ehart's response to Iliff's affrontery of August 26 when he did not discharge Iliff on the spot. He said, "You know what you can do. I mean you can quit." She refused. She told him that he would have to fire her. (Tr.177)

Iliff and Ehart received their promotions on the same day. (Tr.189) Confusion developed with respect to the lines of authority. A management chart was prepared by someone that showed Iliff to be directly responsible to Mrs. Buchanan in Moscow, showing no line making Iliff responsible to Ehart. Iliff told Ehart that he could not discharge her. Ehart's quandry is emphasized by his call, after August 26, to Mr. Stockwell, General Manager of both stores in Moscow, to determine whether or not he (Ehart) had authority to discharge Iliff. He was advised that he had such authority. (Tr.176-177,184-185,189,379-383)

Iliff attended the September 3 late evening meeting at employee Ellen Jones' home and signed a union card. She was not put on any committee. She does not appear to have had any more significant role or import upon the situation than did any of the others, almost all of whom, signed cards. (Tr.159,164)

Upon arrival at work on the *morning* of September 4,

"fair inference" that Buchanan related the contradicted telephone conversation to which Iliff testified to Ehart or anyone else. And, if there is anything on which to base a "fair inference" that she did, there is nothing to indicate that Buchanan disbelieved Iliff's representation that Iliff did not sign a card, or Iliff's implied response indicating she did not attend.

Pertinent portions of the Trial Examiner's Decision, accepted by the Board as supported by a preponderance of the testimony and approved by the Court as based on substantial evidence, follow:

> "There is no doubt that Ehart had ample provocation for discharging Iliff. The question is whether she was discharged solely for cause, or in whole or in part because of protected activity. I find that such activity was one of the reasons for the discharge." (R.22; A., *infra*, p. 68)

His first basis for this finding is that Employer's counsel indicated at the outset of the Hearing that Iliff was discharged for both insubordination and suspected pilfering and later dropped the latter. (R.22-23;A.,*infra*, p. 69) Such is neither probative evidence nor sound reasoning. But, it characterizes the shallow basis upon which much of these findings rest. The Examiner conjectures that Iliff had a desire to discuss "employee grievances" with Connelly and that Ehart was thwarting this. Yet, only Iliff, in self-serving testimony, stated: "I felt" money spent on lie detector tests should be spent in raises; "I didn't think it was fair" to rehire Walters at a dollar sixty; and, lastly, she didn't like time off in lieu of overtime pay. (Tr.172-173) All of this indicates that she was more of a busy-body than engaged in presentation of "employee grievances." Next, the Examiner's finding is based upon alleged delay in exercising the right to discharge, concluding such should have occurred immediately

after learning that he had the right to discharge. There is nothing to indicate precisely when Ehart called to determine that he had authority to discharge nor is there anything to detract from the fact that Iliff's failure to handle the meeting for which she was responsible on the Friday prior to her Monday discharge was not the straw that broke the camel's back. (R.23;A. *infra,* p. 69)

The Examiner's reasoning, accepted by both Board and Court, by which the standards of evidentiary evaluation of *Universal Camera*[8] is grossly misapplied, follows:

> "* * * Although called as a witness, Ehart was not asked *by Respondent* to explain the delay. Indeed, Respondent failed to interrogate him as to his reason for the discharge or any of the circumstances relating thereto. If Ehart regarded Iliff's misconduct as sufficiently serious to warrant a discharge, it was incumbent *upon him* to explain his delay in acting. *The failure to explain,* when combined with the timing of the discharge, i.e., five days after the September 3 meeting and two days after Clevenger arrived at Moses Lake, *suggests* that the misconduct became intolerable to Ehart only after Iliff's expressed desire to discuss employee grievances directly with Connelly was augmented by her participation in the employee meeting.
>
> "There is no direct evidence that Ehart knew that Iliff was present at the meeting. However, I find it reasonable *to infer* that he did. For one thing, the store had a small complement of employees, and news *apparently* traveled swiftly. Moreover, *I have little doubt* that when Clevenger went to the Moses Lake store on September 6, she did not conceal Connelly's anti-union views, and that information regarding the identity of those present at the September 3 meeting was then communicated to Ehart.
>
> "In all the circumstances, I find that Ehart was irked not only by Iliff's insubordination, but also by her

[8] *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474 (1951)

> aggressiveness in wishing to discuss employee grievances; and that when he learned of her presence at the employee meeting, he finally decided that he would rid himself of a strong Union sympathizer as well as a difficult employee. Such a discharge constituted a violation of Section 8(a)(3) and (1) of the Act."[9] (R.23-24; A.*infra*,p. 70; footnotes omitted; emphasis supplied.)

This finding is devoid of any reference to, or any finding that the discharge of Iliff in any manner had the effect of encouraging or discouraging membership in the union. *National Labor Relations Board v. Brown Food Store,* 380 U.S. 278,286-287(1965); *Radio Officers' Union v. National Labor Relations Board,* 347 U.S. 17,42-44(1954)

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[9]This reasoning erroneously placed the burden of proof upon Respondent Employer, rather than General Counsel where it belongs pursuant to the provisions of Sec. 556(d) of the Government Organization and Employees Act. (5 U.S.C. Sec. 556(d) The Examiner's reasoning ignores Iliff's intervening malfeasance in failing to take care of the immediately prior Friday meeting. Although she apologized in the presence of others, there is no acceptable reason to believe that Ehart's alleged acceptance of the apology was any more than to avoid the public appearance of rift. Note, too, the abundance of inference in order to conclude that Ehart knew who was at the September 3 employee meeting. Nothing in the record even remotely supports this unfounded conclusion. The so-called "small plant rule" by which an inference of employer knowledge is supplied because a plant is small, is a tenuous rule at best, not heretofore passed upon by this Court. In its present application, however, it would not be here applicable as it is held within close limits: the event must occur on plant premises, normally during working hours, the employer has an opportunity to observe, and there is independent evidence that he knew, or should have known. *N.L.R.B. v. Joseph Antell, Inc.,* 358 F.2d 880 (1st Cir. 1966); *Osceola County Co-op Creamery Assn. v. N.L.R.B.* 251 F.2d 62 (8 Cir. 1958); *N.L.R.B. v. National Paper Co.,* 216 F.2d 859 (5th Cir. 1954); *American League,* 189 N.L.R.B. No. 85 (1971). That testimony "suggests" a conclusion does not make it sufficiently probative to form the basis for a finding. But, here the Examiner bases the "suggestion" upon a lack of testimony, a "failure to explain" and "timing" so that we have speculation based upon suspicion, hardly the degree of evidence contemplated by this Court in the *Universal Camera* case, *supra.* Absolutely nothing can be found in this record upon which to base even a "fair inference" that Ehart knew that Iliff attended the September 3 meeting.

C. OTHER ALLEGED UNFAIR LABOR PRACTICES

A "department heads" meeting was held on September 9.[10] The meeting was brief and at some point either at or immediately after the meeting someone speculated or repeated a rumor expressing the fear that Mrs. Connelly might shut down the store if the union succeeded in organizing the employees. Neither Ehart nor Banks, the Assistant Store Manager, provided the rumor. (Tr.397-398) There is no allegation in the complaint that Clevenger did, and the complaint was not later amended. (R.6-7) Some of those present at or immediately after this meeting indicated they would seek out other employees and learn whether or not they would be interested in communicating with the union to indicate that they wanted the union to discontinue organizational activities. It was a voluntary effort, if at all, and to take a form chosen by the author. A milling around of employees followed. The union had not yet requested nor claimed recognition. Its posture, strength and who specifically had signed "cards" was unknown. Varying letters were prepared and collected by a non-supervisory employee, who with four other non-supervisory employees, drove to Spokane, 110 miles east of Moses Lake, and delivered the letters to Needham, who simply put them away. Travel was undertaken at the employees' own expense. These letters pleaded with the union to terminate its organizing activity or sought withdrawal from any committments made earlier by signing a union "card." (Tr.242-249,274-275,283,290,327, 329,333-334;GCX 8)

The complaint alleges that "agents and supervisors"

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[10]Department heads here does not connote supervisory employees as defined in Section 2(11) of the National Labor Relations Act, as amended. (29 U.S.C. Sec. 152(11)) While there is conflicting testimony, it does not appear that Ehart or Banks attended this meeting. They were the only two true supervisors at the Moses Lake store.

Boyes and Roberts, who were non-supervisory employees, encouraged and induced employees to prepare and deliver these letters repudiating the union. The Examiner found that it was Clevenger or Banks who encouraged Boyes and Roberts to do so, even though no such allegation appears in the complaint. Thereby, he finds that non-supervisory employees Boyes and Roberts were agents of the Employer. However, being unsure that this finding will stand up, he develops a "fair inference" that another non-supervisory employee, Lehman, also not alleged in the complaint, communicated the desire of management for these letters. (R.6,20;A.,*infra*,pp. 59,60)

The complaint alleged that Connelly, Boyes and Roberts told rank and file employees that the Moses Lake store would be closed or sold if the employees unionized. (R.6) Boyes and Roberts were non-supervisory employees. The Examiner found no evidence to support and allegation. (R.19;A., *infra*. p. 62) However, without a motion to amend the complaint, and without appropriate notice to the Employer that it was to be held responsible for the acts of Clevenger who was not in attendance at the Hearing nor called as a witness, the Examiner found "that such a threat was made by Clevenger."

> "Although the complaint does not expressly allege that Clevenger was one of those who made the threat, I find that the issue was fully litigated." (n.11,R.9;A.,*infra*, pp. 62,63)[11]

The union ignored the September 9 employee letters and on September 15 made formal demand for recognition by presenting a letter to Ehart in his Moses Lake office. (Tr.79-81,146-147) Ehart, who was terminated by the

[11]Such a finding of full litigation when there is neither an allegation that such individual is the basis for an alleged unfair labor practice and that person has not testified denies a fair Hearing, proper notice or due process.

Employer before the Hearing, did not believe the union represented a majority of the store's employees at that time. (Tr.117) The demand letter was forwarded to Mrs. Connelly, who consulted counsel and on September 23 filed a Petition with the National Labor Relations Board seeking a representation election. (Tr.311-312;RX 1) The Petition was thwarted by the union filing of the unfair labor practice charges, since the Board has an internal rule by which it declines to process representation petitions during the pendency of an unfair labor practice proceedings, unless the party filing the charge is willing to waive it.

Ehart testified that work schedules were drawn up by department heads, subject to his approval. (Tr.51-52,61,70,100) Schedules did not always provide for a six day week. (Tr.99,125) The employer did nothing different in the arrangement of the hours than it had done from time to time in the past.[12]

The employees had, from time to time, sought a change in their work days long before the prospect of union organizational efforts. The only change that occurred in September, 1969 was for a two or three week experimental period, commenced before the union made any demand for recognition, and limited to a few employees. The total number of hours worked in the week was not reduced and the rates of pay involved were not changed. The 40 hours was compacted into five days rather than five and one-half in a couple departments. (Tr.100,221-223,237-238,248,401,407)

The complaint charges that Ehart materially revised the work week. (R.6) Without amendment of the complaint, nor any notice that this was going to be attributed to Clevenger, who was not present at the Hearing, the Examiner finds:

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[12]General Counsel attempted to establish a discussion of work schedules at the September 2 and 3 employee meetings. However, several witnesses failed to testify to or recall such discussion. (Tr.236-238,252,258,263-264,394-396)

> "* * * The record further shows that during the second week of September, Clevenger attempted to carry out her mission *inter alia* by reducing the workweek of a number of employees from 6 to 5 days. Although the change had been requested by employees, I find, contrary to Respondent's contention, that Clevenger acceded to their request in order to demonstrate to them that unionization was unnecessary and should be abandoned. Such conduct constituted unlawful interference, restrain and coercion." (R.20,A.,*infra*, p. 64)

The Employer established a policy of reviewing individual employee performance and wage rates quarterly in August, 1968. Both individual wage increases and the amounts were discretionary. Increases were effective June, September, January and March. (Tr.19-21,38-39,125-129; GCX 3)

Pay increases effective September 1 were reflected in the pay day for the pay period ending on September 15, which was September 18, 1969. Evaluations of employees occurred in August. (Tr.39-40,126)

The Examiner assumes that the wage increases granted September 1 were made to undermine the union even though it is clear that the union did not come upon the scene until September 3 and recognition was not sought until September 15.[13]

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[13] General Counsel sought to establish the wage increases as effective September 16, 1969. There is no evidence to support such a conclusion. (GCX 3) No employee produced a check stub or a payroll explanation of any other effective date than September 1. Employee Nettie Parsons received her raise in a check between September 16 and 20 and then decided later that it was for the pay period September 16 through 30. (Tr.300,301-302) The latter could not have occurred if the former is correct and she did not suggest that she *received* the increase in a paycheck in October. Employee Gary Rosenow was confused as to when he got his raise, first testifying it was after Mr. Jones talked to the employees. He later said the raise was paid him about three weeks after the September 2-3 meetings. (Tr.306) In either instance, the raise would have been effective September 1 and paid no later than September 24. No other employee testified about the raise.

Nine employees received wage increases effective September 1, 1968, 26 were increased on December 1, 1968, 6 in March, 1969, 6 on June 1, 1969 and 19 on September 1, 1969. The increases actually granted effective September 1, 1969 were smaller than those granted at prior quarterly intervals. Nine of the 19 who received an increase on September 1, 1969 had not received an increase in the last year and 5 had not received an increase in 9 months. Seventeen employees who had received prior wage increases who continued on the Employer's payroll did not receive an increase on September 1, 1969. (GCX 2 and 3)

The Examiner refused to credit the testimony of Buchanan and Ehart that evaluations were made in August for the September 1 increases. (R.20,A.,*infra*,p. 65)) Instead, he speculates that Connelly should have given testimony on this subject and it was for Respondent to explain why, if a decision was made before September 1, that it was not immediately announced. (R.21,A.,*infra*,p. 65)[14]

The Examiner directed a bargaining order finding that on September 15 the union had a majority, ruling the letters voiding earlier cards were for naught as illegally instigated. His findings are also predicated on the failure of Connelly to have expressed a doubt of majority status, even though Ehart did, and because she did not accept the union offer of a card check. No mention is made nor any recognition given to the Employer's prompt seeking of a representation election through Board procedures. The Examiner concludes that the foregoing unfair labor practices make a free election unlikely and directs a bargaining order which was approved by the Board and affirmed by the Court (R.26-27;A.,*infra*,p.73-75)

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[14] This kind of reasoning simply makes no sense. The Employer offered two witnesses on the subject which he discredits. What makes anyone believe that he would have accepted the testimony of anyone else?

REASONS FOR GRANTING THE WRIT

References in this matter, for the most part, are made to the Trial Examiner's Decision because the Board, in a most summary manner, without real explanation or evaluation, preemptorily accepted that Decision. There is nothing to distinguish the Board's Decision, save its complete acceptance of the Trial Examiner's Decision. The Court of Appeals has made a token effort to justify the Examiner's Decision.

Viewed in perspective, this case illustrates how the practice of the Board and its agents, affirmed by the Court, has lapsed into the very condition Congress sought to correct in the passage of the Labor Management Relations Act of 1947. (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*) That Act incorporated a number of amendments in the National Labor Relations Act intended to provide safeguards against the evils perpetuated under the Wagner Act. The amendments relating to the quality and quantity of proof and review were paramount and are thwarted in a case such as this.

The Decision and Judgment of the Court below is not simply wrong. It illustrates the need for this Court's clarification of a number of principles applicable under the National Labor Relations Act, as amended, as well as the Government Organization and Employees Act which sought to rearrange and codify certain of the provision originally enacted in the Administrative Procedure Act.

Succinctly, the reasons why this Writ should be granted are:

1. This matter was not decided in accord with the decisions of this Court. Thus, in *National Labor Relations Board v. Brown Food Store*, 380 U.S. 278,286-287 (1965) this Court made it abundantly clear that there must be affirmative findings *on all three elements* of a charged violation of Section 8(a)(3) of the National Labor Relations

Act, or there was no such violation. There must be a finding (1) that the employer *knew* of the employee's protected activity; that the discharge was effectuated *because* of that activity; and, (3) that the discharge had the effect of encouraging or discouraging membership in a labor organization.

Neither the Board nor the Court made any finding concerning the effect of the discharge in this matter. There is not even a line that it may be assumed from the existence of the other two elements, assuming them proven for the purposes of this argument. The Examiner stated:

> "There is no doubt that Ehart had ample provocation for discharging Iliff. The question is whether she was discharged solely for cause, or in whole or in part because of protected activity. I find that such activity was one of the reasons for discharge." (R.22; A.,*infra,* p. 68)

That is not enough. Instead, it establishes the need for independent evidence completely lacking in this matter. As this Court stated in the *Brown Food Store* decision:

> "* * * But where, as here, the tendency to discourage union membership is comparatively slight, and the employer's conduct is reasonably adapted to achieve legitimate business exigencies, we enter into an area where the improper motivation of the employer must be established by independent evidence. When so established, antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice. *Labor Board v. Erie Transistor Corp.* [373 U.S. 221,227 (1963)], and cases there cited." (380 U.S. at 287-288)

As stated in another way in the *Brown Food Store* decision, the employer's conduct must be "demonstrably so destructive of employee rights or so devoid of significant service to any legitimate business end that it cannot be

tolerated consistently with the Act." (380 U.S. at 286)

2. Nor was this matter decided in accord with *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951). Any one of the Examiner found unfair labor practices will illustrate this point. However, we will stay with the three elements necessary to a finding of discriminatory discharge under Section 8(a)(3) and (1) of the Act as those elements were set forth by this Court in *Brown Food Store, supra.*

The first two elements compel a finding that the employer *knew* the discharged employee was engaged in protected activity and that the discharge was *because* of such activity. Here Iliff's union activity consisted of simply going to an employee meeting along with some 20 other employees at another non-supervisory employee's home. While there, she, along with some 20 other employees, signed union cards. There is no more.[15] Thus, there is absolutely no evidence of any kind that sets Iliff out as any more of a target for discrimination than any one of twenty other employees. She was much less of a target than was Ellen Jones, the non-supervisory employee at whose home these two meetings were held. If the employer knew all about the meetings, as the Examiner implies, then Iliff was certainly no reasonable target if the employer sought to deter union organizational efforts. This is made even more apparent from the testimony surrounding the department managers' meeting of September 9, the day after Iliff's discharge. The Court below places an

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[15]There is reference to the incident on August 26, at least one week or more before the meeting at which the union organizer was in attendance and cards were signed. The entire testimony concerning that incident, as related by Iliff, is set forth herein at pp.7-8, *supra*. It is to be noted that she was not acting at the request of anyone else with regard to any alleged grievances or complaints. Nor was she engaged in any protected activity concerning herself. To call her conduct of that day as engaged in discussing "employee grievances" is crediting it with far more than any reading of the evidence permits.

emphasis on the fact that Iliff was discharged the day before that meeting as though it was necessary to do so to keep Iliff out of that meeting. (477 F. 2d at 206, A., *infra*, p.41) Yet, the evidence is clear that the meeting was not contemplated by anyone before sometime late in the morning after the morning of Iliff's discharge. And, there is not one whit of evidence that Iliff's discharge was mentioned in any manner in connection with the September 9 meeting or its aftermath. If Iliff's discharge was to have any impact, there should have been some little evidence of that fact after the discharge. There was none.

The foregoing reasoning conflicts with the *Universal Camera* case in that:

> " * * * The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. * * * " (340 U.S. at 488)

Here, the ample provocation that existed for the discharge of Iliff, the fact that her union activity was limited to no more than that of some 20 other employees, that there were no special union attributes that made it more desirable to be rid of her, and that there were other employees that were more desirably targets for discharge if union activity is to be regarded as the objective for discharge, *inter alia*, provide those portions of the record which fairly detract from the weight to be given the speculative conclusions adopted by the Examiner, accepted by the Board and for which the Court below amazingly found substantial evidence.

3. This brings us to still another important reason why the Writ should be granted. Here the Examiner relied upon the most questionable "small plant rule" to find that Ehart, the one who discharged Iliff, knew of Iliff's attendance at the

meeting and that she signed a union card. The "small plant rule" presumes employer knowledge of things that go on at the plant when the plant complement is small.[16] That rule does not appear to have been passed upon nor approved by this Court. While that rule is supposed to be limited to acts and statements that occur on the plant premises where a small complement of employees are employed, the Examiner here extended it to acts that occured off plant premises, i.e., the meeting at Ellen Jones' home and to a store in which there were over 40 employees. (R.23,A.,*infra*, p. 70) In erroneously applying this rule, accepting its validity for the purposes of the argument, it is to be noted that he also takes testimony out of context. Thus, he credits witness Collins with testifying that everyone at the store "seemed" to know about the meeting. (n.19,R.23,A., *infra*, p. 70) But when Collins' testimony is examined it is clear that she was talking about how she learned about the meetings of September 2 and 3 in order to attend them. (Tr. 252) Her testimony does not support the conclusion that what occurred at those meetings became common gossip on the store premises.

4. Either there has been a complete misapprehension of some of the principles presented in the *Universal Camera* case, *supra*, or some of those principles compel a further examination and clarification by this Court.

The Ninth Court at 477 F.2d 206, Appendix, *infra*, pp.40,41, ruled in favor of the Board thus finding substantial evidence, on this quote from the *Universal Camera* case:

> "* * * Nor does it mean that even as to matters not requiring expertise a court may displace the Board's

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[16] *National Labor Relations Board v. Joseph Antell, Inc.*, 358 F.2d 880 (1st Cir. 1966); *Osceola County Co-op Creamery Assn. v. National Labor Relations Board*,251 F.2d 62 (8th Cir. 1958);*National Labor Relations Board v. National Paper Co.*, 216 F.2d 859 (5th Cir. 1954); *American League*, 189 N.L.R.B. No. 85 (1971).

> choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.* * * * " (340 U.S. at 488)

This statement requires careful analysis. There must be "two fairly conflicting views" in order for it to have any application. On the other hand, if there are "two fairly conflicting views" has the General Counsel of the Board sustained his burden of proof, required both by the National Labor Relations Act and Section 556(d) of the Government Organization and Employees Act? If he has sustained his burden of proof, then the opposing view is not a "fairly conflicting view." But, if there are "two fairly conflicting views" then it is obvious that he has not sustained his burden of proof. Or, put another way, Section 10(c) of the National Labor Relations Act compels that a "preponderance of the testimony" be found in the evidence taken by the Board in order to find the existence of an unfair labor practice. If there be "two fairly conflicting views," one of which does not sustain the existence of an unfair labor practice, it should be patent that testimony does not preponderate in favor of the existence of an unfair labor practice.

In this same connection, this Court in the *Universal Camera* case appears to have interjected still another theme which requires the attention and correction of this Court. Preliminary to the "two fairly conflicting views" statement occurs the observation:

> "* * * Nor was it intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect. * * * " (340 U.S. at 488)

And, the earlier "two fairly conflicting views" quote from *Universal Camera* uses a reference to matters "not requiring expertise."

There can be no doubt that Congress did not intend to attribute a degree of expertise to the Board or its employees which could in any manner be used in the absence of or as a substitute for hard evidence. The House Conference Report on the Labor Management Relations Act, 1947, (29 U.S.C. Sec. 151 *et seq.*) which amended the rules of evidence, decision and review of the National Labor Relations Act, included statements of "presumed expertness on the part of the Board in its field *can no longer be a factor* in the Board's decision." Courts were admonished to insure that the Board "does not infer facts that are not supported by evidence or that are not consistent with evidence in the record," and, "the language [of the Act] also precludes the substitution of expertness for evidence in making decision."[17]

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[17] The full applicable quote from House Conference Report No. 510, 80th Cong., 1st Sess. 56, 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 560 follows:

> "As previously stated in the discussion of amendments to section 10(b) and section 10(c), by reason of the new language concerning the rules of evidence and the preponderance of the evidence, *presumed expertness on the part of the Board in its field can no longer be a factor in the Board's decisions.* * * *"
>
> The Report continues: "The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of Section 10(b) of the conference agreement insure the Board's receiving only legal evidence, and Section 10(c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine—whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact language which the conference agreement adopts—will very materially broaden the scope of the courts reviewing power. This is not to say that the courts will be required to decide any case de novo themselves weighing the evidence, but they will be under a duty to see that the Board

The harm in leaving these two clearly misapprehended, if not erroneous, statements concerning the standards of proof and review to be applied to matters decided under the National Labor Relations Act, without clarification or revision, is obvious. The number of cases heard and decided by the Board and the Courts is great and the Ninth Court has found it convenient to hide behind the "two fairly conflicting views" theory much too frequently.[18] Reliance upon the alleged expertise of the Board, as this Court did in *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, n.32, 612 (1969), illustrates a danger that Congress sought to avoid in the referenced comments of the House Conference Report.

These deviations from the contemplated standards of proof and review that Congress sought to enact simply puts the state of the law by which the National Labor Relations Act is interpreted and enforced back to that state which Congress sought to correct in enacting the amendments to the National Labor Relations Act. An examination of that legislative history will show that Congress was making a determined effort to avoid any future decision of the Board to be based on this kind of alleged evidence: inference,

[17](cont.)

observes the provisions of the earlier sections *that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record*, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. *The language also precludes the substitution of expertness for evidence in making decisions.* * * *" (Emphasis supplied)

[18]In addition to the case at bar, see *National Labor Relations Board v. Ayer Lar Sanitarium*, 436 F.2d 45,48-49 (9th Cir. 1970); *National Labor Relations Board v. Custom Chair Manufacturing Co.*, 422 F.2d 1300,1301 (9th Cir. 1970); *National Labor Relations Board v. Luisi Trunk Lines*, 384 F.2d 842,846 (9th Cir. 1967); *National Labor Relations Board v. Stanislaus Implement & Hardware Co.*, 226 F.2d 377,381 (9th Cir. 1955). See also *National Labor Relations Board v. U. S. Railway Equipment Co.*, 424 F.2d 86,89 (7th Cir. 1970).

speculation, surmise, implication, conjecture, or the alleged expertise of the Board.[19] Yet, as we look at a case such as the one here at bar, we can readily see that speculation, inference, surmise and conjecture have been substituted for hard evidence and without regard to the record when viewed as a whole.

5. The quality of evidence to be acceptable to establish a preponderance of the testimony or upon which substantial evidence rests needs the pronouncements of this Court. Why is it that we read so little of what constitutes a preponderance of the testimony in the decisions of the Courts of Appeal? It would appear that each Court rests its scope of review upon the "substantial evidence" test found in Section 10(e) of the National Labor Relations Act and appears to totally disregard whether or not substantial evidence exists to support the "preponderance of the testimony" required. Perhaps counsel does not completely grasp the matter. However, the Board may not find an unfair labor practice in the absence of a preponderance of the testimony. How can testimony preponderate when conclusions are based upon speculation, surmise, conjecture or inference, even compounded by one inference placed upon another, e.g., the inference that it is a small plant or store so there is much gossip about union activities compounded to then infer knowledge to the store manager because he has so little to do that he knows of all gossip that occurs on the store premises. There is a need for clarification of the role to be played by the Courts of Appeal in review of Board cases in terms of the preponderance of the testimony and the extent to which inferences may be drawn or compounded. This case affords a particularly excellent opportunity to clarify and expound

[19]The legislative history of the amendments of the National Labor Relations Act are interspersed with clear efforts to curtail the flimsy basis upon which Board decisions were made and affirmed by the Courts. In particular, see 1 Legis. Hist. Labor Mgmt. Relations Act, 1947, 331-332,557-560,697,910; 2 Legis. Hist. 1542

upon the correct rules, as well as their refinement, for we have an amazing sequence of reasoning, based upon implication, inference and speculation, without any real or hard evidence in the Examiner's conclusion that Iliff's discharge, at least in part, was *because* of protected activity. For example, it cannot be considered evidence or testimony that counsel in an opening statement alleges that proof will be presented that her discharge was for both insubordination and suspected pilfering and then, as the case unfolds, made no presentation on the latter. Yet the Examiner appears to be influenced by this. (R.22-23,A., *infra* p. 69) Or, the fact that the Employer, having heard all of the testimony in support of a discriminatory discharge, believing the alleged proof to fall considerably short of the mark, chooses not to question Ehart concerning it. Such certainly cannot be regarded as probative testimony or evidence. Yet, the Examiner appears to have been influenced by it. (R.23,A., *infra*, p. 69) What impact should "delay" have on one of these matters? If the Examiner is going to rely on "delay" as the basis for assuming a discriminatory motivation, is he not compelled to rule out any intervening basis for discharge by specific reference and disposition of the intervening situation? Here he chose to completely ignore the incident testified to and admitted by Iliff in which she "forgot" to handle a meeting for which she was responsible just three days before her termination. These are but a few of many examples of the latitude taken by the Examiner in reaching his decision which was summarily accepted by the Board and which the Court affirmed, bowing out under the "two fairly conflicting views" theory. The examiner took these same freedoms in his handling of the other alleged unfair labor practices.

6. Much has been said in the cases about the personal demeanor of witnesses having some magic by which the trier

of the fact may conclude that the witness lies, or is less to be believed than another. The time has come to look at that question squarely. Unless there is something to which the Examiner can point in the treatment of the evidence, e.g., inconsistencies, constant evasiveness, or something equally as concrete, is not demeanor a demeaning evaluation of witnesses? Inconsistencies, evasiveness or something equally concrete is evident in a cold record just as much as it would be if one were present at the time a matter was tried. The comment of the Court of Appeals for the 7th Circuit in *Indiana Metal Products v. National Labor Relations Board*, 442 F. 2d 46,52 (1971) is one which should be adopted by this Court:

> "Differentiating between credibility based upon demeanor and credibility based upon analysis of the evidence could well be a semantical exercise in conceptulism of gossamer calibre."

7. Does not a conflict among the Circuits exist, when a Court, though correctly setting forth the legal principle involved proceeds to a conclusion which, in a real sense, denies that principle? This is what appears to have happened in this case. The Court below cites its own decision in *National Labor Relations Board v. Ayer Lar Sanitarium*, 436 F.2d 45 (1970) as the basis for this decision. There the rule is correctly stated in question form: "In other words, would this employee have been discharged *but for* his union activity?" (436 F.2d at 50) But, the rule is nullified by the application of such tenuous rules as "timing", the failure of the employer to do particular things, the coincidence of the discharge at the time other equally tenuous unfair labor practices are found to exist, etc. Thus, for example, decisions like the one here at bar and perhaps the *Ayer Lar* decision are in conflict with the First Circuit as it described the correct rule in *National Labor Relations Board v. Fibers Inter-*

national Corp., 439 F.2d 1311, 1311-1312 (1971):

> "Examination of the NLRB's yearly reports shows that much more often than not we have enforced the orders of the Board. There is one area, however, where we have never seen eye to eye: the test for determining whether a discharge for established misconduct was in fact an unfair labor practice. Having in mind that a business decision is involved, it has been our position that the Board has the burden of making a *clear* showing that the employer's *dominant* motive was not a proper business one, but union animus. * * * " (Emphasis supplied)

The Board sought rehearing, seeking the deletion of the italicized words "clear" and "dominant." The Court declined to do so, pointing out:

> "To dominate means to control. The 'dominant' motive is the controlling or effective motive. We use this particular word because of its insistent quality, to remind the Board that its burden is to find that the improper motive was the one that in fact brought about the result." (439 F.2d at 1315)

That Court then discussed the cases of the Second, Third, Fifth and Sixth Circuits illustrating that while each may use different words, the requirement of proof that anti union animus must be the "dominat" motive runs through all of them. Of course, this is in accord with the *Brown Food Store* decision of this Court, *supra.*, pp. 20-21.

8. This Court does not appear to have ruled upon the essential elements to be found before employer interrogation constitutes an infringement of employee rights under Section 8(a)(1) of the National Labor Relations Act. Thus, here, illegal interrogation is found in a telephone call, denied by the alleged employer party to that call, in which the total complained of interrogation rests upon the employees testimony that (1) she wouldn't know what went on in the two

employee meetings and, (2) that she did not sign a union card. It seems completely unreasoning to accept so little as an interference with employee rights necessitating a finding of violation of the Act. The Ninth Court in the *Ayer Lar* case 436 F.2d 45 at 49 (1970) has accepted the definition of the Fifth Circuit in *National Labor Relations Board v. Varo, Inc.*, 425 F. 2d 293,298 (1970):

> "An Act of interrogation is not coercive or intimidating on its face, but may be conducted in such circumstances that it will tend to intimidate or coerce the employees. We are careful to note that the test is whether the questioning tends to be coercive, not whether the employees are in fact coerced. * * * In order to decide whether the interrogation would tend to coerce the employees, we must look to all the circumstances surrounding the questioning. Several factors should be considered in weighing the lawfulness of company interrogation of employees: (1) The history of the employer's conduct and attitutde toward its employees; (2) the nature of the information sought – for example, did the interrogator appear to be seeking information on which to base action against individual employees; (3) the position or office of the interrogator in the company's hierarchy; (4) the place and method of interrogation -- was the employee summoned to the boss' office, or was there an atmosphere of 'unnatural formality?'; and (5) truthfulness of the reply. * * * "

In *National Labor Relations Board v. Sebastopol Apple Growers*, 269 F.2d 705,709 (1959) the Ninth Court said:

> "This Court in *N.L.R.B. v. McCatron*, 9 Circ., 1954 216 F.2d 212, at page 216, said:
> 'We are of the opinion that in order to violate Section 8(a)(1) such interrogation must either contain an express or implied threat or promise, or form part of an overall pattern whose tendency is to restrain or coerce. We so held in *Wayside Press, Inc. v. N.L.R.B.*, 9 Cir. 1953, 206 F.2d 862 [1953]. Other circuits have taken the same view.' In this case there is no evidence that

> anyone was 'actually interfered with, restrained or coerced,' nor do we find in the question any 'express or implied threat or promise.'"

In spite of these pronouncements, the Court below made no effort to analyze the alleged interrogation found illegal by the Board here.

9. When a Complaint sets forth the names of the individuals who are supposed to have commited the acts forming the basis for the alleged unfair labor practices, it is neither proper nor due process to find that still another individual, not *named in the complaint*, is the one who engaged in illegal acts. Section 10(c) of the National Labor Relations Act limits a finding of unfair labor practice to "any person named in the complaint." The Rules and Regulations of the Board specify:

> "* * * The complaint shall contain * * * a clear and concise description of the acts which are claimed to constitute unfair labor practices, including where known, the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed." (29 C.F.R. Sec. 102.15)

The Board's rules also provide for liberal opportunities to amend the Complaint. See 29 C.F.R. Sec. 102.17.

Here there is absolutely no mention in the Complaint of Terri Clevenger, the management consultant retained by Mrs. Connelly to help her with the duties she assumed on the passing of her husband, Lee Connelly. Her name came up in the hearing on a number of occasions, but at no time did the General Counsel move to amend the complaint. In these circumstances, the Employer did not seek out or obtain Clevenger's presence or testimony at the hearing. It had no obligation to defend against any allegations pertaining to Clevenger for there were none.

It is believed that there has been a denial of due process as protected by the Fifth Amendment to the United States

Constitution in the absence of proper notice and a fair hearing which related to the alleged acts of Clevenger.

10. There are several elements of the decision of this Court in *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575 (1969) that need the attention and disposition of this Court which arise in the cause involved here. For example, it is not clear whether or not the alleged union majority, established by union cards, is to be one in existence *at any time* prior to the filing of the charge with the National Labor Relations Board or one which must be in existence at the precise point at which a demand for recognition is made. Certainly there should be a requirement of an unequivocal demand being made upon an employer and either proof that a majority then exists or a method by which that proof may be ascertained by an impartial and objective agency, such as the National Labor Relations Board. To assume an existing majority, without clear manifestation of it to the employer, whether proven or not, does not appear either reasonable or practical.

The factual situation in this case provides an opportunity to this Court to deal with this issue and to resolve it. It is an important issue because the number of Board directed bargaining orders is substantial and continuing. Directed bargaining orders should be a most limited remedy.

Here there appears to have been very nearly a majority, or a majority, of cards signed at a time when only the union knew it. There is nothing in the record to indicate that the employer knew it or that even the employees knew it. There were several individual letters to the union of disclaimer or revocation of signatures on the cards. The Examiner ruled that this was instigated by the Employer, but dependent on how this Court deals with some of the other issues raised in this case, it is not proven that the Employer actually had any hand in the effort. It appears to have been employee inspired.

It would seem a most reasonable principle that an employee can revoke his signature just as easily as he can be induced to put his signature upon a union card. Why one act should take any greater precedence over the other, except as to the time that each occurred, appears beyond comprehension unless an element of bias is permitted to intercede.

The concept that the union must have a majority of signed union cards at one time or another appears to be the current requirement necessary to direct a bargaining order, assuming extensive employer unfair labor practices. While Petitioner believes that examination of the other points involved will nullify the findings of unfair labor practices here to the point that a bargaining order is not proper, definition as to the extent and manner in which union cards are to be considered and treated is warranted and necessary.

II. Failure to fully analyze the evidence to insure that substantial evidence existed for established criteria of Board found unfair labor practices emphasizes that the Court below has not performed its statutory responsibility. This Court should review and clarify several principles in this case to insure responsible application of the standards of proof and review as well as to act in its supervisory capacity over Courts of Appeal.

CONCLUSION

For the foregoing reasons, it is respectfully represented that the writ for certiorari should be granted.

Respectfully submitted,

October 11, 1973

George J. Tichy
Attorney for Petitioner

(Appendices Follow)

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

TRI-STATE STORES, INC.,
Respondent.

No. 71-1563

[September 29, 1972]

Petition to Review a Decision of the National Labor Relations Board

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Before: HAMLEY, GOODWIN and WALLACE, Circuit Judges.

WALLACE, Circuit Judge:

Pursuant to § 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), the National Labor Relations Board (hereinafter "NLRB") has petitioned this Court for enforcement of its order issued against Tri-State Stores, Inc. (hereinafter "Company") on October 1, 1970.[1] The NLRB has ordered the Company to cease and desist from committing unfair labor practices, to offer to reinstate a discharged employee and to bargain with the Union upon

[1] The NLRB's decision and order are reported at 185 NLRB No. 117 (1970).

demand.[2] We hold the order of the NLRB is to be enforced.

The Company's department store in Moses Lake, Washington, was the situs of the alleged unfair labor practices. It is one of two stores owned and operated as separate corporations by Doris E. Connelly. The other is located in Moscow, Idaho, about 100 miles away, where Connelly has her office and where the administrative functions of both stores are centered. The Moses Lake store had 41 employees at the time of the alleged violations.

Prompted by Connelly's requiring polygraph tests to stem suspected pilferage, some of the Moses Lake employees held a meeting on September 2, 1969, to discuss this and other grievances. A Teamsters Union representative met with them and later contacted a Retail Clerks Union representative who met with 23 employees the following night. At the meeting, 22 signed cards authorizing the Union to act for them, and 6 more signed cards within a week, for a total of 28.

When the meetings were reported to Connelly, she sent Terri Clevenger (a management consultant), together with a gentleman business friend, to Moses Lake to deal with the situation. During a meeting with employees on September 6, Clevenger remarked that there were "questions coming up about raises," said she "wanted [the employees] to be happy," and asked if they "had anything bothering [them] or that [they] would like to have done." An employee asked if a five-day work week could be substituted for the six-day week and Clevenger replied that she "didn't know why [not]." Clevenger and the business friend then returned to Moscow and gave assurances to Connelly that, if Clevenger spent further time in Moses Lake, the employees would be

[2]The Union involved is Retail Clerks Union, Local 1439, AFL-CIO.

"calmed." About this time, the Company posted a notice at Moses Lake that the polygraph tests had been postponed.

There was also testimony that, on September 9 at a meeting of department managers, Clevenger advised that the doors would be closed if the employees unionized. Pursuant to a discussion in that meeting, all department heads immediately solicited the employees to send letters revoking the prior authorization given by the cards. Some employees were told of the threat to close the store. By the end of the day, 35 employees[3] wrote letters stating they no longer wished the Union to represent them.

During the second week in September, employees who worked six days a week were rescheduled to five although they continued to work 40 hours. About three weeks later, however, the Company restored the original schedule. In addition, 19 employees received wage increases in their pay checks distributed some time after the middle of September. All but one of those receiving increases had either written a withdrawal letter or had never signed an authorization.

The NLRB affirmed the Trial Examiner's findings (1) that the Company violated § 8(a) (1) of the Act by questioning its employees concerning their union activities, threatening them with closing the store if they did not cease such activity, soliciting them to withdraw their Union authorization cards and increasing their wages and improving their working hours to induce them to defect from the Union; (2) that the Company violated §§ 8(a) (3) and 8(a) (1) of the Act by discharging employee Ilse Iliff because of her interest in and activities on behalf of the Union; and (3) that the Company violated §§ 8(a) (5) and 8(a) (1) of the Act by refusing to bargain with the Union upon request after the Union had

[3]Apparently, out of an abundance of caution, more withdrawal letters were solicited than the number of union cards signed.

obtained authorization cards signed by a majority of the employees in an appropriate unit.

We have reviewed the record as a whole and conclude that there is substantial evidence therein to support the findings of the NLRB. 29 U.S.C. §160(e); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

The Company has especially challenged the finding in relation to the discharge of Ilse Iliff. The Company argues that Moses Lake store manager Ehart had an adequate and independent legal basis for the discharge of Iliff. There is clear evidence in the record of Iliff's insubordination. In front of other employees, Iliff called Ehart a "puppet on a string" and made several outspoken, rather critical, suggestions to Ehart as to how the store should be managed, including a suggestion of pay raises. Iliff also spoke critically of Ehart to her fellow employees and related the "puppet on a string" incident to them.

On the other hand, the apparent reason that Iliff called Ehart a "puppet on a string" was that she felt that Ehart did not have enough authority to do anything about employees' grievances and, therefore, a trip to Moscow by Iliff to speak with Connelly would be necessary. Furthermore, four days prior to Iliff's discharge the office manager for both stores telephoned Iliff, interrogated her about the Union's organizational attempts and asked whether she had signed a Union authorization card. Although the office manager denied any knowledge of such a call, it is well-settled that the Trial Examiner has the responsibility of evaluating the credibility of witnesses and the weight to be given their testimony since he is in a position to observe demeanor and other firsthand indications of truthfulness. See *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970), and cases cited

therein. Finally the Trial Examiner and the NLRB felt the timing of Iliff's discharge significant: she was not fired until two weeks after the "puppet on a string" incident; but the firing occurred on the very day before a meeting of the department managers which she would have attended and at which the subject of Union organizational activity would have been discussed. As we have said before,

> [t]his court cannot displace the Board's choice between two fairly conflicting views, even though this court would justifiably have made a different choice had the matter been before it de novo. . . . This deference extends as well to the inferences reasonably drawn by the Board, even though this court might have drawn different ones. *NLRB v. Ayer Lar Sanitarium, supra* at 48-49.

The Company questions the propriety of the NLRB order which directs it to bargain with the Union. The Company conceded the appropriateness of the bargaining unit. The Union obtained 25 valid authorization cards and there were between 38 and 41 nonsupervisory employees. However, the Company refused to bargain with the Union and filed a petition with the NLRB alleging a bona fide doubt as to whether the Union had a majority. The apparent basis of this refusal was the sending of withdrawal letters by employees subsequent to their authorizations. However, there was substantial evidence of threats, coercion and restraint; and one apparent union sympathizer had been discharged. In addition, Connelly told store manager Ehart that she did not want the store unionized and that he should refuse any demand for recognition. Connelly sent Clevenger to Moses Lake to counsel the employees against unionizing; and it is not denied that Clevenger told employees that Connelly would close the store if they did so. Thereafter, various department managers, acting pursuant to the instruc-

tions of Clevenger, importuned the employees to withdraw their authorizations and, in some instances, even drafted the withdrawal.

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court in sustaining the NLRB's authority to issue bargaining orders when certain unfair labor practices have been committed, stated:

> The only effect of our holding here is to approve the Board's use of the bargaining order in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order on a lesser showing of employer misconduct is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; in such a case, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. 395 U.S. at 614-15.

See also, *NLRB v. Ayer Lar Sanitarium, supra* at 51; *NLRB v L. B. Foster Company*, 418 F.2d 1, 3-4 (9th Cir. 1969), *cert. denied*, 397 U.S. 990 (1970).

The NLRB found that a bargaining order was needed here because the unfair labor practices were "intended to undermine the Union and were so coercive as to destroy the likelihood of holding a free election among its employees." Since this finding is supported by substantial evidence, the order to bargain is appropriate under *Gissel.* The Company interrogated and discharged a suspected Union sympathizer. It raised wages, changed working hours, threatened to close the store, and caused 35 of the 38 to 41 eligible employees to disavow the Union. There is substantial evidence to support the NLRB's conclusion that: "In such circumstances, it strains credulity for respondent to assert its good faith, particularly when such assertion is predicated upon card revocations which were obtained through its own unlawful conduct."

The Company argues that, even if it has been guilty of the unfair labor practices mentioned, the passage of time has dissipated the effects so thoroughly as to make an order to bargain inappropriate. As we stated in *NLRB v. South Bay Daily Breeze,* 415 F.2d 360, 367 (9th Cir. 1969), *cert. denied,* 397 U.S. 915 (1970):

> We recognize that the passage of time brought about by respondent's conduct may have cooled the organizational order that existed in 1965 or, indeed, may have seen the occurrence of substantial changes in the composition of the bargaining unit; but these difficulties are in some measure, the sort that inhere in any orderly system of adjudication, and are in any event not determinative. (Citation omitted.)

We have already pointed out the difficulty with the position argued for by the Company: employers would gain a great incentive to refuse to recognize a bona fide bargaining

demand in hopes that a delay would terminate the difficulty. See *NLRB v. L. B. Foster Company, supra* at 4.

Accordingly, we find that the NLRB's bargaining order is a reasonable exercise of its discretion and must be enforced in its entirely.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*	
vs.	No. 71-1563
TRI-STATE STORES, INC., *Respondent.*	**ORDER**

[June 18, 1973]

Before: HAMLEY, GOODWIN and WALLACE, Circuit Judges

Respondent's Petition for Rehearing of the above matter is denied.

Due to illness, Judge Hamley did not participate in this Order.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* v. TRI-STATE STORES, INC., *Respondent.*	No. 71-1563

[July 16, 1973]

JUDGMENT

Before: HAMLEY, GOODWIN and WALLACE, Circuit Judges

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of a certain order issued by it against Tri-State Stores, Inc., its officers, agents, successors, and assigns on October 1, 1970. The Court heard argument of respective counsel on July 13, 1972, and has considered the briefs and transcript of record filed in this cause. On September 29, 1972, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order in its entirety. In conformity therewith, it is hereby

ORDERED AND ADJUGED by the Court, that Respondent, Tri-State Stores, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating or threatening its employees, unlawfully encouraging, requesting or in any manner aiding its employees to revoke union authorization cards, and unlawfully improving the hours of work or rates of pay of its employees in order to influence them to reject unionization.

(b) Unlawfully discharging employees or otherwise unlawfully discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

(c) Unlawfully failing or refusing to bargain collectively with Retail Clerks Union, Local No. 1439, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

> All employees of Respondent employed at 515 West Broadway, Moses Lake, Washington, excluding the store manager, assistant manager, guards, professional employees, and supervisors as defined in the Act.

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of any right guaranteed in Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action:

(a) Offer to Ilse L. Iliff immediate and full reinstatement to her former or a substantially equivalent position, and make her whole for any loss of earnings she may have suffered by reason of Respondent's discrimination against her, in the manner set forth in the section of the Trial Examiner's Decision entitled The Remedy.

(b) Notify the above-named employee, if presently

serving in the Armed Forces of the United States, of her right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents on request, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Judgment.

(d) Upon request, bargain collectively with Retail Clerks Union, Local No. 1439, AFL-CIO, as the exclusive representative of the employees in the unit found herein to be appropriate, and embody in a signed contract any understanding reached.

(e) Post at its store in Moses Lake, Washington, copies of the notice attached hereto and marked Appendix. Copies of said notice, on forms provided by the Regional Director for Region 19 of the National Labor Relations Board, Seattle, Washington, shall, after being signed by Respondent's representatives, be posted by the Respondent immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 19, in writing, within 10 days from the date of this Judgment, what

steps it has taken to comply herewith.

July 16, 1973
Endorsed, Judgment
Filed and Entered

/s/ Dennis R. Matthews

With costs in this Court in favor of the Board and against the Respondent.

Costs:

Printing of Board's brief . . .$199.20

SO ORDERED

/s/ Alfred T. Goodwin

/s/ J. Clifford Wallace

U. S. Circuit Judges

APPENDIX

NOTICE TO EMPLOYEES

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Act gives all employees these rights:

To engage in self-organization

To form, join or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection; and

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unlawfully discharge employees or otherwise discriminate against them because of their union activities.

WE WILL NOT unlawfully question or threaten our employees.

WE WILL NOT unlawfully encourage, ask, or help our employees to revoke their union authorization cards.

WE WILL NOT unlawfully increase wages or improve working hours in order to induce our employees not to unionize.

WE WILL OFFER to take back Ilse L. Iliff to her old job and

pay her for all the wages she lost because of her discharge.

WE WILL, upon request, bargain collectively with Retail Clerks Union, Local No. 1439, AFL-CIO, as the exclusive representative of all our employees in the following unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment, and embody in a signed agreement any understanding reached. The bargaining unit is:

> All employees of Respondent employed at 515 West Broadway, Moses Lake, Washington, excluding the store manager, assistant manager, guards, professional employees, and supervisors as defined in the Act.

TRI-STATE STORES, INC.
(Employer)

Date _____ By _____
(Representative) (Title)

NOTE: We will notify Ilse L. Iliff, if presently serving in the Armed Forces of the United States, of her right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Republic Bldg., 10th Floor, 1511 Third Avenue, Seattle, Washington, 98101, Telephone No. 583-7473.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TRI-STATE STORES, INC. and RETAIL CLERKS UNION, LOCAL NO. 1439, AFL-CIO	Case 19-CA-4523

[185 NLRB 829]

DECISION AND ORDER

On May 13, 1970, Trial Examiner Maurice Alexandre issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint and recommended that these allegations be dismissed. Thereafter, the Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief. The General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor

Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, and hereby orders that Respondent, Tri-State Stores, Inc., Moses Lake, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D.C. Oct. 1, 1970

John H. Fanning, Member

Gerald A. Brown, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

[1] In footnote 22 of his Decision, the Trial Examiner inadvertently misquotes from the record. The correct quotation reads "I don't remember if I doubted one way or the other. I doubted if there would be a majority if it were put to a vote at this time, I don't know."

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

TRI-STATE STORES, INC. and RETAIL CLERKS UNION, LOCAL NO. 1439 AFL-CIO	Case No. 19-CA-4523

Joseph L. Davis, Esq., for the General Counsel.
Martin, Gale & Warren, by **Lloyd G. Martinson, Esq.**, of Moscow, Idaho, for the Respondent
Bassett, Donaldson, & Hafer, by **Thomas K. Cassidy, Esq.**, of Seattle, Wash., for the Charging Party.

TRIAL EXAMINER'S DECISION

MAURICE ALEXANDRE, Trial Examiner: This case was heard in Moses Lake, Washington, on January 6, 7 and 8, 1970, upon a complaint issued on October 31, 1969,[1] alleging that Respondent had violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended. In its answer, Respondent denied commission of the unfair labor practices alleged. The issues presented are whether or not Respondent violated those sections by engaging in various acts of interference, restraint and coercion, by

[1] Based on an original and an amended charge filed, respectively, on September 29 and October 13, 1969, by Retail Clerks Union, Local 1439, AFL-CIO, hereafter called the Union.

discharging Employee Ilse L. Iliff, and by failing to accede to the Union's request for bargaining.

Upon the entire record, my observation of the witnesses, the brief filed by the General Counsel and adopted by the Charging Union, and the brief filed by Respondent, I make the following:

Findings and Conclusions[2]

I. The Unfair Labor Practices

Respondent is a Washington corporation engaged in the operation of a retail department store in Moses Lake, Washington. The president of the corporation is Doris E. Connelly, who is also president of another corporation which operates a companion store in Moscow, Idaho, where most of the administrative functions relating to both stores are performed. Catherine J. Buchanan is Respondent's secretary-treasurer. John S. Ehart was manager of the Moses Lake store until the end of September 1969,[3] when he was replaced by Jim L. Anderson. Patrick Banks was assistant store manager.

A. Interference, Restraint and Coercion

1. The Evidence

In August 1968, following the death of her husband, Connelly took over management of the two stores. Being

[2]No issue of commerce is presented. The complaint alleged and the answer admitted facts which, I find, establish that Respondent is an employer engaged in commerce within the meaning of the Act. I further find that the Union is a labor organization within the meaning of the Act.

[3]All dates hereafter referred to relate to 1969 unless otherwise stated.

without business experience, she encountered considerable difficulty in coping with the problems which faced her. One of these problems consisted of rumors that she intended to close or sell the Moses Lake store. Connelly testified that sometime during July 1969, she told Store Manager Ehart that if her problems continued, she would feel compelled to discontinue operation of the store.

On or about August 25, because of reports of pilferage at the two stores, Connelly adopted a policy under which employees of both stores would be asked to take polygraph, or lie detector, tests. Upon learning of the new policy, Respondent's employees became disturbed and decided to hold a meeting at the store. Assistant Manager Banks telephoned the Moscow store and reported the situation to Connelly. Buchanan and a representative of the company which furnished the polygraph service thereupon went to Moses Lake and the latter explained the mechanics of the test at the meeting of employees.[4] Among other things, he told them that the test was voluntary, and that anyone who volunteered would receive a bonus of $20.

On the evening of September 2, Respondent's employees met at the home of Employee Ellen Jones to discuss the polygraph policy. At the meeting, the employees also discussed the possibility of obtaining a five-day workweek, a matter which they had previously discussed with Manager Ehart. After the meeting, a representative of the Teamsters Union who had been present at the meeting, called the Charging Union herein, and suggested that one of its representatives meet with Respondent's employees the following day. The employees met again at Ellen Jones' home

[4]Connelly accompanied them to Moses Lake but did not go to the meeting.

on September 3, at which time Needham, an organizer for the Union, appeared, explained the advantages of union representation, stated that if a majority of the employees signed authorization cards, the Union would request recognition by Respondent, but told them that Respondent might insist that the Union prove its majority through a Board election. Needham then distributed authorization cards, read the contents to them, and told them not to sign if they had questions or were unsure of themselves. At the meeting, a number of employees signed cards and returned them to Needham. In addition, Needham received cards from six additional employees between Sepbember 3 and 9.

Connelly testified that on September 3 or 4, Controller Tout told her that he had received a telephone call from Assistant Manager Banks reporting the union activity at Moses Lake. At first, she testified that she received this information on September 3 or 4, but then stated that it was after those dates, adding that it was difficult to remember. Connelly further testified that she was shocked and that she discussed the situation with Buchanan. On Sepbember 4, Buchanan telephoned Employee Iliff at Moses Lake and questioned her regarding the union situation.[5]

On the same day, Connelly telephoned two individuals for help: Terri Clevenger, a self-employed management consultant who had performed services for her in the past, and Bill Jones, a friend. Connelly testified as follows regarding her reason for seeking Clevenger's help:

Q. Then, I take it, you felt the polygraph test was one of the reasons that was causing the union activity in your Moses Lake store?

[5] Iliff's discharge on September 8 is discussed below.

A. I think it was the reason.

Q. So you called Terri Clevenger to see if she could calm the employees in the Moses Lake store?

A. Yes.

Q. And I presume, then, from what you are saying, that the reason you wanted her to calm the employees at the Moses Lake store was to eliminate this union activity?

A. Not specifically, no –

* * *

Q. Was that one of the reasons?

* * *

A. It was not the primary reason.

Q. Was it one of the reasons?

A. I never considered it that way. I never considered it –

Q. (Interrupting) Did you call Terri Clevenger after you found out about the union activities?

A. I was concerned about the uproar in this store, the personnel problems we were having in the store.

* * *

Q. Did you mention the union situation?

A. I probably did. The polygraph test and the union are almost synonymous in my thinking. I probably did.

Connelly also told Jones about both the polygraph and union problems. Jones expressed the opinion that Clevenger would be helpful, agreed to fly her to Moses Lake in his plane, and stated that he would try to talk to the employees and calm them. Clevenger and Jones arrived at the Moses Lake store on September 6, and talked to the employees as a group. Jones

told them he was not going to take over the store, and Clevenger told them that she would talk individually with any employees who wished to discuss any problem. Connelly testified that Clevenger and Jones returned to Moscow on September 7 and reported to her their belief that the employees would be calmed if Clevenger spent time in Moses Lake talking to them. At about that time, Respondent posted a notice on the store bulletin board stating that the polygraph tests had been postponed. Thereafter, Clevenger returned to Moses Lake, remained at the store for several weeks, and talked to employees individually.

Store Manager Ehart testified that on or about September 9, he was told by Connelly that if the store were unionized, she would very likely close it. Ehart relayed this information to Assistant Manager Banks, William Boyes and several other store department heads. On the same day, the department heads met at the store. Employee Lehman testified that with Ehart's permission, she attended the meeting as a substitute for Moulton, her department head; that Clevenger, Ehart, Banks, Boyes and Cathy Roberts were at the meeting; that Banks and Clevenger did most of the talking; and that the latter told those present: "The fat is in the fire. I just got the word from Moscow, the store will, the doors will close if this union deal goes through." Lehman further testified that Clevenger or Banks stated that something would have to be done before the Union representative arrived at the store, that Banks stated that he would telephone a lawyer and left the room, that on his return he stated that he had been told by the lawyer that the only way "to stop the cards going through" was for the employees to write letters to the Union withdrawing their authorization cards and stating that they wished to bargain directly with Respondent, and that Clevenger or Banks instructed those present to request the

employees in their departments to write such letters. Ehart testified that at the employees' request, he, Banks and Clevenger did not attend. However, Cathy Roberts testified that the three individuals were at the meeting, that someone at the meeting informed those present of a "rumor" that Connelly would probably close the store if the Union came in, that neither Ehart nor Banks made the statement, but that she did not know who did. Clevenger did not testify.

There is considerable testimony that after the close of the meeting, Cathy Roberts told employees about Connelly's statement regarding closing the store. Roberts did not contradict this testimony.[6] In addition, the department heads, including Boyes and Roberts, followed their instructions and solicited employee letters revoking their authorization cards. In one instance, Roberts went to the home of an employee to request such a letter and wrote out the contents of the letter when the employee stated that she did not know how to word it.

A total of 35 employees wrote letters to the Union stating in effect that they did not wish to be represented by the Union. Department Head Boyes told Employee Dirk to collect the letters. Later that day, Boyes told Manager Ehart that he was going to the Union's office in Spokane to try to obtain revocation of the authroization cards signed by employees, and Ehart raised no objection.[7] Boyes then left

[6]Some of the employees testified that Roberts had told them that Connelly's statement was contained in a letter. Roberts merely testified that she had never seen such a letter.

[7]Boyes was night manager and was presumably scheduled to work that night.

for Spokane accompanied by four employees.[8] On their arrival, two of the employees took the letters to the Union's office. On the next day, September 10, Boyes told Ehart that he had not succeeded in obtaining revocation of the cards.[9]

During the above-mentioned conversations with employees, Clevenger had been asked whether the number of workdays per week could be reduced, and she replied that this could be done. About the second week of September, Clevenger told a number of the employees who worked 6 days a week that they could work 5 days a week. About 3 weeks later, Respondent restored them to the original schedule. Sometime during September, Respondent gave a number of employees a wage increase.

2. Concluding Findings

The complaint alleges, and I find, that Respondent violated Section 8(a)(1) of the Act by interfering with, restraining and coercing its employees in the following respects:

(a) As noted above, Buchanan telephoned Employee Iliff on September 4, the day after the employees met for the second time and signed authorization cards. Iliff testified that Buchanan stated that there had been an employee meeting and asked her about the "union business" at the store, that Iliff pretended ignorance, that Buchanan then stated that she had heard that most of the girls who had attended the employee meeting had signed authorization cards and in-

[8]One of the four, Graham, testified that he was scheduled to work that night, asked and received permission from Boyes to be on leave, but was not paid for the time.

[9]Boyes was on a salary basis and received his full pay for the period which included September 9.

quired whether Iliff had signed one, and that Iliff answered in the negative. On interrogation by the General Counsel, Buchanan denied knowledge of the meeting, but then admitted learning of the September 3 meeting sometime after the discharge of Iliff on September 8. In view of Connelly's testimony that she learned of the meeting and discussed it with Buchanan on September 4, the latter's testimony is obviously unworthy of credit. Buchanan further testified that she could not recall the telephone conversation described by Iliff, and that "to the best of [her] knowledge" she did not discuss authorization cards with her. On interrogation by counsel for Respondent, Buchanan denied having discussed Union activities with Iliff. I credit Iliff's testimony as more reliable, and find that she was unlawfully interrogated by Buchanan. There is no merit to Respondent's defense in its brief that Buchanan had no management position at the Moses Lake store and that her duties were clerical. Buchanan was secretary-treasurer of Respondent.

(b) I find no evidence to support the allegation in the complaint that Connelly and Boyes told any rank and file employees that the Moses Lake store would be closed or sold if the employees unionized. However, I find that such a threat was made by Clevenger.

The record establishes, and I find, that Clevenger attended the meeting of September 9, and that she told those present that she had received word that the store would be closed if the employees unionized. Since Clevenger was Respondent's agent, the Respondent is accountable for her conduct. And since at least one rank and file employee, Lehman, was

present at the time,[10] the threat to close the store was unlawful.

Respondent defends by asserting that the record shows that business continued as usual and that physical improvements were made in the store after September 29, when Ehart was replaced as store manager. It further points out that in a written notice to the employees, posted on October 20, Connelly expressly stated that Respondent had not authorized, and repudiated, statements that the store would be closed if unionized. This evidence fails to establish that the threats made on September 9 were lawful. On the contrary, it shows that the coercive tendency of the threat continued for at least a month.[11]

(c) The record establishes, and I find, that on September 9 Boyes and Cathy Roberts solicited and obtained from the employees a number of letters repudiating the Union as their bargaining representative; that in one case Roberts helped an employee prepare such a letter; and that Boyes accompanied other employees in taking the letters to the Union's office. This conduct was unlawful unless Respondent is not accountable therefor. Respondent contends that it cannot be held accountable because Boyes and Roberts were not supervisors. I find that Respondent must be held accountable because in engaging in the conduct in question, Boyes and Roberts,

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[10]The parties stipulated that Lehman's department head, Moulton, was an employee within the meaning of the Act. Since she went to the meeting as a substitute for Moulton, Lehman *a fortiori* was an employee.

[11]Although the complaint does not expressly allege that Clevenger was one of those who made the threat, I find that the issue was fully litigated.

Although I find that Cathy Roberts repeated the threat to close the store to rank and file employees, I deem it unnecessary to resolve the parties' dispute as to whether she was a supervisor. For, even if it were determined that she was a supervisor, this would merely result in a finding of additional, cumulative threats.

whether or not supervisors, were acting as Respondent's agents and the employees knew it.

According to the credited testimony of Employee Lehman, who was present at the September 9 meeting, either Clevenger or Banks, instructed those present at the meeting, including Boyes and Roberts, to obtain the letters. Since Clevenger was Connelly's agent and Banks was an admitted supervisor, it follows that Boyes and Roberts acted as agents for Respondent in carrying out their instructions, irrespective of whether received from Clevenger or Banks. Moreover, it is a fair inference that Lehman communicated the events at the meeting to the employees, and hence that they were aware that management wanted such letters. In addition, Boyes was permitted to take the letters to the Union office in Spokane by Store Manager Ehart, who had been present when the instructions were given, who knew the purpose of Boyes' trip, and who nevertheless permitted payment of Boyes' full salary for the period which included his trip.

(d) The record establishes that Connelly learned of the employees' union activity on September 3 or 4, that she felt that such activity was caused by the announcement of the polygraph test policy, and that she immediately arranged for Clevenger to go to the Moses Lake store to "calm" the employees and persuade them to abandon their attempt to unionize. The record further shows that during the second week of September, Clevenger attempted to carry out her mission *inter alia* by reducing the workweek of a number of employees from 6 to 5 days. Although this change had been requested by employees, I find, contrary to Respondent's contention, that Clevenger acceded to their request in order to demonstrate to them that unionization was unnecessary and should be abandoned. Such conduct constituted unlawful interference, restraint and coercion.

(e) The record shows that 19 of the Respondent's employees received wage increases effective September 1. However, Employees Rosenow and Parsons testified without contradiction that they first learned of their increases at the end of September or beginning of October. Buchanan and Ehart testified that Respondent regularly evaluated employee performance each calendar quarter and that upon receiving recommendations from the store manager, Connelly determined which employees would receive pay increases. An employee admittedly did not receive an increase as a matter of course. They further testified that the evaluations for the September 1 increases were made in August, i.e. before the commencement of union activity. Respondent contends that since evaluations were made in August pursuant to an established program, the wage increases were unrelated to union activity and hence were lawful. According to Respondent, it had no choice but to give the increases since it could have been urged that its failure to do so was an unfair labor practice.

I do not credit the testimony of Buchanan and Ehart respecting the date of the evaluations. Buchanan admitted on cross-examination that she had no information respecting the matter and had merely assumed the date. As for Ehart, I find that he had a poor memory and was an unreliable witness. Moreover, even if it were assumed that the evaluations were made in August, there is no evidence that Connelly made the final decision respecting the increases before the commencement of union activity. Connelly gave no testimony respecting the date of her decision, and Respondent has failed to explain why, if the decision was made before September 1, it did not announce the wage increases immediately.

For these reasons, I am not persuaded that the increases were in fact decided upon on or before September 1, and

find that they were put into effect after Respondent learned of the commencement of the union activity on September 3 or 4, and indeed after the Union's request for recognition on September 15 (see *infra*), in order to influence the employees to reject unionization.

(f) The record establishes that the taking of the polygraph test by employees was voluntary, and that they were so informed by an agent of Respondent as early as August 25. I accordingly find, in agreement with Respondent, that the record fails to support the allegation of the complaint that Respondent unlawfully eliminated the test as a mandatory condition of employment.[12]

B. The Discharge of Ilse L. Iliff

1. The Evidence

Iliff was hired by Respondent on April 2, 1968, and worked as an office clerk until August 22, 1968, when she was promoted to assistant office manager.[13] She was informed of her promotion by Ehart, who had just been promoted to the store manager's job. Beginning in November 1968, friction broke out between Ehart and Iliff. According to Iliff, their "first feud" occurred in that month, but she denied that she was discourteous to him "at that time." She further testified that they got along well at times, but that at other times, she "criticized" him; that they "had several conflicts"; that they "argued" at times; that she is "outspoken"; and that she has been described as "tactless." On August 26, the

[12] At the hearing, the General Counsel was given leave to strike that portion of the complaint which alleged that Respondent had unlawfully improved and reestablished a pension plan.

[13] The parties stipulated that Iliff was a rank and file employee at all times material.

day after the polygraph policy was announced, Iliff, who was under the impression that Ehart intended to go to the Moscow store to see Connelly, told him that she wished to talk to Connelly herself about certain grievances relating to pay and employment. Ehart asked her, in effect, why she could not discuss her problems with him, and Iliff replied, "Well, because you are a puppet on a string." She then related the conversation to another employee.

On September 3, Iliff attended the employee meeting at the home of Ellen Jones and signed a union authorization card. As already found, during a telephone conversation with Iliff on September 4, Buchanan revealed her knowledge of the meeting, stated that she had heard that most of the employees at the meeting had signed authorization cards, and asked Iliff whether she had signed a card.

On September 8, Store Manager Ehart informed Iliff that she was discharged. Connelly testified that two or three weeks before that date, she was informed by General Manager Stockwell that he had received a telephone call from Ehart, who inquired whether he had authority to discharge Iliff,[14] and that Stockwell replied that he did. She further testified that she first learned of the discharge from Ehart, that he did not tell her why, and that she did not ask him because she assumed, as a consequence of Ehart's inquiry respecting his authority to discharge Iliff, that he was having difficulties with her. She also testified that she was subsequently told by Stockwell that Ehart had made his inquiry and had discharged Iliff because the latter had challenged his authority.

[14] Iliff was supervised by Buchanan in her work duties, and her name appeared under that of Buchanan instead of Ehart on the table of organization prepared after their promotions. Thereafter, she told him in several occasions, allegedly in jest, that he had no authority to discharge her.

At the time he discharged Iliff, Ehart asked whether she wished to discuss the matter, and she replied that she did not unless he did. According to Iliff, she responded in this fashion and did not ask the reason for her discharge because Union Organizer Needham had warned that employees who signed authorization cards might be discharged. Ehart furnished no testimony respecting any of the foregoing events. Buchanan testified that she had never discharged or recommended the discharge of any employee at the Moses Lake store.

2. Concluding Findings

Respondent contends that Iliff was discharged solely because of her insubordination. The General Counsel contends that Respondent had theretofore always condoned her misconduct; but that when it learned or began to suspect that Iliff had engaged in Union activity, it decided to discharge her. In support of this contention, the General Counsel argues that Connelly learned on September 4 of the existence of Union activity and the execution of the authorization cards, and that Buchanan's interrogation of Iliff concerning the authorization cards demonstrates that she knew that Iliff had signed a card. Such knowledge, the General Counsel argues, creates an inference that Iliff was discharged because of protected activity, and that the burden of establishing has been met inasmuch as Respondent has failed to present any direct evidence rebutting such inference.

There is no doubt that Ehart had ample provocation for discharging Iliff. The question is whether she was discharged solely for cause, or in whole or in part because of protected activity. I find that such activity was one of the reasons for the discharge.

First, I note that at the hearing, Respondent took the position that it discharged Iliff for both insubordination and suspected pilfering.[15] Apparently, Respondent has shifted its position somewhat, and now relies only on insubordination.[16] I further note that at the time of her conversation with Ehart on August 26, Iliff informed him of her desire to discuss certain employees' grievances with Connelly. Since Ehart indicated his feeling that Iliff wanted to go over his head and told her that such problems were none of her concern and that she was trying to interfere in management prerogatives, it is apparent that he was nettled by Iliff's desire to discuss employee grievances with Connelly as well as by her insubordinate remarks to him.

In addition, although Ehart ascertained that he had authority to discharge Iliff, he did not exercise that authority promptly, but waited until September 8 to discharge her, i.e. a period of almost two weeks. Although called as a witness, Ehart was not asked by Respondent to explain the delay. Indeed, Respondent failed to interrogate him as to his reason for the discharge or any of the circumstances relating thereto.[17] If Ehart regarded Iliff's misconduct as sufficiently serious to warrant a discharge, it was incumbent upon him to explain his delay in acting. The failure to explain, when combined with the timing of the discharge, i.e. five days after the September 3 meeting and two days after Clevenger arrived at Moses Lake, suggests that the misconduct became intolerable to Ehart only after Iliff's expressed desire to

[15]At the commencement of the hearing, counsel for Respondent stated that Iliff was discharged because of a personality conflict with Ehart "and also that there was some suspicion of pilfering in the store. She was the center of this, being suspected."

[16]There is not a shred of evidence relating to pilfering by Iliff.

[17]I accord no probative weight to Connelly's hearsay testimony that Stockwell told her that Ehart had discharged Iliff because she had challenged the latter's authority.

discuss employee grievances directly with Connelly was augmented by her participation in the employee meeting.

There is no direct evidence that Ehart knew that Iliff was present at the meeting. However, I find it reasonable to infer that he did. For one thing, the store had a small complement of employees,[18] and news apparently traveled swiftly.[19] Moreover, I have little doubt that when Clevenger went to the Moses Lake store on September 6, she did not conceal Connelly's anti-union views, and that information regarding the identity of those present at the September 3 meeting was then communicated to Ehart.[20]

In all the circumstances, I find that Ehart was irked not only by Iliff's insubordination, but also by her aggressiveness in wishing to discuss employee grievances; and that when he learned of her presence at the employee meeting, he finally decided that he would rid himself of a strong Union sympathizer as well as a difficult employee. Such a discharge constituted a violation of Section 8(a)(3) and (1) of the Act.

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[18]Respondent had some 40 employees (see *infra*).

[19]Employee Collins testified that everyone at the store seemed to know about the meeting. Assistant Store Manager Banks learned of the meeting almost immediately and promptly reported his information to Controller Tout in Moscow, who in turn called Connelly. Ehart testified that it was no secret that the employees were organizing, and that he had heard that authorization cards had been signed. I do not credit Ehart's testimony that he did not learn of the September 3 meeting until two or three weeks later.

[20]It is likely, for example, that Cathy Roberts, who was present at the meeting, was a source of such information. Although no finding is made as to whether she was a supervisor, I am satisfied that she considered herself aligned with management. Thus, Union Organizer Needham testified without contradiction that at the time Roberts signed an authorization card, she expressed the belief that she might be a supervisor. In addition, she admitted that she may have told a representative of the Board's Regional Office that she could effectively recommend the hiring or firing of employees.

C. The Refusal to Bargain

1. Respondent's answer admits, and I find, that the following constituted an appropriate unit of Respondent's employees at the time material herein:

> All employees of Respondent employed at 515 West Broadway, Moses Lake, Washington, excluding the store manager, assistant manager, guards, professional employees, and supervisors as defined in the Act.

The record contains a typewritten list which, the parties stipulated, contains the names of 45 persons employed by Respondent on September 15. Four of the names were crossed out and the parties further stipulated that the four names should be disregarded because Banks was a supervisor and the other three were no longer employed on September 15. Although initially there was a dispute as to whether six of the remaining 41 employees on the list were supervisors or rank and file employees, the parties ultimately stipulated that three, Chandler, Dirk and Moulten, fell into the latter category. The parties are still in dispute as to whether Boyes, Roberts and Hamilton are supervisors or employees includable in the unit.

It is unnecessary to determine the exact number of employees in the unit by resolving the status of the three disputed employees. For however such status is resolved, the record nevertheless establishes, and I find, that as of September 15, there were between 38 and 41 employees, that the Union had at least 25 valid authorization cards,[20a] and that it thus represented a majority.

[20a] In arriving at this figure, I have not included the cards signed by the following: Kibuchi whose name does not appear on the typewritten list, Wright whose name is crossed out, and Roberts whose supervisory status is in dispute.

2. On September 15, Union Organizer Needham went to the Moses Lake store and gave Ehart a sealed envelope which Needham identified as containing the Union's demand for recognition. Ehart accepted the envelope but then returned it to Needham, stating that he was not authorized to receive it.[21] Needham put the envelope on Ehart's desk and left. Clevenger than entered the office, Ehart telephoned Connelly, and he was instructed to open the envelope. Clevenger opened it, and Ehart read the contents of the Union's demand to Connelly. The letter, which was addressed to Ehart, read as follows:

> This is to notify you that a substantial majority of your employees in the collective bargaining unit described below have designated Retail Clerks Union, Local 1439, AFL-CIO, N. 1615 Division St., Spokane, Washington as their exclusive collective bargaining representative.
>
> In view of such designation, we now demand recognition, for the purpose of collective bargaining, as the exclusive representative of such employees. The collective bargaining unit in which we demand recognition consists of:
>
> "All selling and non-selling employees employed at the following location, Tri-State Distributors, Inc., 515 W. Broadway, Moses Lake, Washington 98837 and excludes store manager, assistant store manager, guards, watchmen and supervisors as defined in the Labor Management Relations Act as amended."

[21]Ehart testified that Connelly had told him she did not want to go union, and that she had instructed him to refuse to accept the demand "when it was delivered." Connelly testified that she expected to hear something from the Union, and that after learning from Controller Tout that some kind of cards had been signed, she instructed Ehart that he was without authority to accept a Union demand for recognition.

> The Union is proposing a meeting at our office, N. 1615 Division, Spokane, Washington or any other mutually agreeable place on Thursday, September 25, 1969 at 2:00 P.M. for the purpose of negotiating a collective bargaining agreement. If such date is inconvenient for you, please notify us so that a more convenient date can be agreed upon.
>
> If there is any doubt in your mind that the Union does in fact represent a majority of employees, we are willing to permit a neutral person to check our authorization cards at the time of such meeting for the purpose of verifying our majority status.[22]

He then forwarded the letter to Connelly. Respondent never requested the Union to establish its claimed majority, nor has it ever bargained with the Union. However, the parties stipulated that Respondent filed a petition for an election on September 23.

I find that the Union, on or about September 15, requested Respondent to bargain with it as the exclusive bargaining representative of the employees in an appropriate unit, and that Respondent has refused to do so at all times since that date. In its brief, Respondent attempts to justify

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[22]Ehart testified as follows respecting his belief concerning the Union's majority at the time he read the letter:

Q. Did you have any reason at that time to doubt whether or not the Retail Clerks 1439 represented a substantial majority of your employees as set forth in that paragraph?

A. No, I don't believe so. I don't think I did any except for the feeling that I couldn't accept it just as it was without question.

Q. You had no reason at that time to doubt that the statement was correct?

A. I don't remember if I doubted it one way or the other. I doubted if there would be a majority if it were put to a vote at that time, I don't know.

its conduct by claiming a good faith belief on the part of Respondent that the Union did not represent a majority. In support of this alleged belief, Respondent asserts that the Union did not "openly" organize the employees, that it did not communicate with Respondent's officers, that it did not exhibit the authorization cards to Respondent, and that the employees signed letters withdrawing the authorization cards. The fact is, however, that Connelly knew that the employees had signed Union authorization cards; that her agents sought and obtained letters from employees purporting to revoke their authorization cards; that she then instructed Ehart to refuse to accept the Union's bargaining request which she anticipated; that the Union's request for bargaining nevertheless reached Connelly; and that despite her alleged doubt concerning the Union's majority, she neither expressed it nor accepted the Union's offer to submit to a card check. In such circumstances, it strains credulity for Respondent to assert its good faith, particularly when such assertion is predicated upon card revocations which were obtained through its own unlawful conduct. An employer may, of course, reject a recognition request, and demand an election "with a simple 'no comment' to the union." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575. But Respondent was not content to follow that path. Instead, it engaged in conduct which demonstrated a desire to delay and avoid bargaining irrespective of whether or not the Union had a majority.

Apart from Respondent's attempt to delay and avoid bargaining, I find that Respondent's unfair labor practices were intended to undermine the Union and were so coercive as to destroy the likelihood of holding a free election among its employees. I agree with Respondent that the preferred method of determining a union's majority status is a Board election. But where the employer engages in unfair labor

practices which make it unlikely that the employees can freely express their wishes in such an election, it is appropriate to determine such status on the basis of authorization cards which they have executed. And if the cards establish a majority, a finding that the employer violated his obligation to bargain and the issuance of a bargaining order are warranted. *N.L.R.B. v. Gissel Packing Co., supra.* I find that Respondent's numerous and serious violations of the Act have made a free election unlikely. And having concluded that the Union had a card majority at the time of its demand for recognition, I further find that Respondent violated its obligation to bargain with the Union and that the issuance of a bargaining order is appropriate.[23]

II. Conclusions of Law

A. By interfering with, restraining and coercing its employees, as found herein, Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

B. By unlawfully discharging Employee Ilse L. Iliff, as found herein, Respondent engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

C. By unlawfully refusing to bargain with the Union, as found herein, Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

[23]Respondent's assertion in its brief that to bargain with a union that does not represent a majority of its employees would constitute action "contrary to the rights of the employees" demonstrates a rather belated concern for those rights. Nor would such rights be adequately protected by Respondent's offer, made in its brief, "to issue such statements to employees and do such other things as may be proper and necessary to assure a fair election." It is true, as Respondent points out, that the Board ordered an election despite the employer's unfair labor practices in *H. W. Elson Bottling Co.*, 155 NLRB 714. That case is, however, inapposite since there, unlike here, the union did not have a majority at the time of its demand for recognition.

D. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

E. Respondent did not violate the Act by any conduct not found herein to constitute an unfair labor practice.

III. The Remedy

I recommend that Respondent cease and desist from its unfair labor practices, and that it take certain affirmative action designed to effectuate the policies of the Act. Specifically, I recommend that Respondent offer to Ilse L. Iliff immediate and full reinstatement to the position which she held at the time of the discrimination against her or to a substantially equivalent position, without prejudice to her seniority and other rights and privileges. I further recommend that Respondent make Iliff whole for any loss of earnings she may have suffered by reason of the discrimination against her, by paying to her a sum of money equal to that which she would have been paid by Respondent absent such discrimination, less net earnings during the said period. The loss of earnings shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716. In addition, for the reasons already noted above, I shall recommend that Respondent bargain with the Union as the majority representative of Respondent's employees in the unit found herein to be appropriate.

IV. RECOMMENDED ORDER

Respondent, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Unlawfully interrogating or threatening its employees, unlawfully encouraging, requesting or in any manner aiding its employees to revoke union authorization cards, and unlawfully improving the hours of work or rates of pay of its employees in order to influence them to reject unionization.

(b) Unlawfully discharging employees or otherwise unlawfully discriminating in regard to their hire, tenure of employment, or any term or condition of employment.

(c) Unlawfully failing or refusing to bargain collectively with Retail Clerks Union, Local No. 1439, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit:

> All employees of Respondent employed at 515 West Broadway, Moses Lake, Washington, excluding the store manager, assistant manager, guards, professional employees, and supervisors as defined in the Act.

(d) In any other manner interfering with, restraining or coercing its employees in the exercise of any right guaranteed in Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer to Ilse L. Iliff immediate and full reinstatement to her former or a substantially equivalent position, and make her whole for any loss of earnings she may have suffered by reason of Respondent's discrimination against her, in the manner set forth in the section herein entitled "The Remedy."

(b) Notify the above-named employee, if presently serving in the Armed Forces of the United States, of her right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and make available to the Board or its agents on request, for examination and copying, all payroll records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Recommended Order.

(d) Upon request, bargain collectively with Retail Clerks Union, Local No. 1439, AFL-CIO, as the exclusive representative of the employees in the unit found herein to be appropriate, and embody in a signed contract any understanding reached.

(e) Post at its store in Moses Lake, Washington, copies of the notice attached hereto and marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 19 shall, after being signed by Respondent's representatives, be posted by the Respondent im-

[24] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and Recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

mediately upon receipt thereof and maintained by it for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director for Region 19, in writing, within 20 days from the date of the receipt of this Decision and Recommended Order, what steps have been taken to comply herewith.[25]

Dated: May 13, 1970

/s/ Maurice Alexandre
Trial Examiner

[25]In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 19, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Act gives all employees these rights:

To engage in self-organization

To form, join or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection; and

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT unlawfully discharge employees or otherwise discriminate against them because of their union activities.

WE WILL NOT unlawfully question or threaten our employees.

WE WILL NOT unlawfully encourage, ask, or help our employees to revoke their union authorization cards.

WE WILL NOT unlawfully increase wages or improve working hours in order to induce our employees not to unionize.

WE WILL OFFER to take back Ilse L. Iliff to her old job and pay her for all the wages she lost because of her discharge.

WE WILL, upon request, bargain collectively with Retail Clerks Union, Local No. 1439, AFL-CIO, as the exclusive representative of all our employees in the following unit with respect to rates of pay, wages, hours of work, and other

terms and conditions of employment, and embody in a signed agreement any understanding reached. The bargaining unit is:

All employees of Respondent employed at 515 West Broadway, Moses Lake, Washington, excluding the store manager, assistant manager, guards, professional employees, and supervisors as defined in the Act.

TRI-STATE STORES, INC.
(Employer)

Date _____ By _____
(Representative) (Title)

NOTE: We will notify Ilse L. Iliff, if presently serving in the Armed Forces of the United States, of her right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, Republic Bldg., 10th Floor, 1511 Third Avenue, Seattle, Washington, 98101, Telephone No. 583-7473.

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519; 29 U.S.C. Sec. 151 *eq seq.*) are as follows:

Section 7 (29 U.S.C. Sec. 157): Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 8(a)(1), (3) in pertinent part, and (5) (29 U.S.C. Sec. 158(a)(1), (3) and (5):

Section 8(a) It shall be an unfair labor practice for an employer–

(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:* * *.

* * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of Section 9(a).

Section 10(c) and (e) (29 U.S.C. Sec. 160(c) and (e)), in pertinent part:

Section 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *.

Section 10(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by

the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.* * *. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

The relevant provisions of the Government Organization and Employees Act (80 Stat. 378, 5 U.S.C. Sec. 101 *et seq.*) with particular reference to the Administrative Procedure (Chap. 5, 80 Stat. 380, 5 U.S.C. Sec. 501 *et seq.*) and Judicial Review (Chap. 7, 80 Stat. 392, 5 U.S.C. Sec. 701 *et seq.*) Chapters, formerly portions of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. Sec. 1001 *et seq.*), are as follows:

Section 551 (5 U.S.C. Sec. 551) Definitions

For the purpose of this subchapter

* * *

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

* * *

Section 556(d) (5 U.S.C. Sec. 556(d)): Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of

policy shall provide for the exclusion or irrelevant, immaterial or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.* * *

Section 706 (5 U.S.C. Sec. 706): To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial do novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX D

IF YOU DO NOT LOOK OUT FOR YOUR OWN INTERESTS–WHO WILL?

It is an established fact that some retail employees go on year after year working for much less than their services to their employer are actually worth only because they have not taken the initiative to belong to an organization which upholds their economic interests.

THE RETAIL CLERKS INTERNATIONAL ASSOCIATION IS THE ONLY ORGANIZATION DEVOTED EXCLUSIVELY TO THE INTERESTS OF RETAIL EMPLOYEES.

TAKE THE FIRST STEP FILL OUT seal and mail this TODAY.

(Your Confidence Will be Respected.)

Fold along this line, seal and mail. No postage required.

RETAIL CLERKS INTERNATIONAL ASSOCIATION
(Affiliated with the A.F.L.-C.I.O.)

Authorization for Representation

Desiring to enjoy the rights and benefits of collective bargaining I, the undersigned, employee of the _____

_____
(Firm Name)

Employed as _____ Dept. or Store No. ____
(Job Title)

Home Address _____ Phone _____

hereby authorize Retail Clerks International Association, A.F.L.-C.I.O. or its chartered Local Union to represent me for the purposes of collective bargaining, respecting rates of pay, wages, hours of employment, or other conditions of employment, in accordance with applicable law.

Date _____ _____
(Signature of Employee)

Union Card (GCX 7-9)

SUPREME COURT, U. S.

FILED

NOV 28 1973

MICHAEL RODAK, JR., CLERK

No. 73-654

In the Supreme Court of the United States

OCTOBER TERM, 1973

TRI-STATE STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 37-44) is reported at 477 F. 2d 204. The Board's decision and order (Pet. App. B, pp. 52-79) are reported at 185 NLRB 829.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1973 (Pet. App. A, pp. 46-49). The petition for a writ of certiorari was filed on Monday, October 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that the company restrained and coerced its

employees in the exercise of their organizational rights, discharged an employee because of her union activity, and refused to bargain with the union though it represented a majority of the employees in an appropriate unit.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 4.

STATEMENT

A. The Board's Findings of Fact

1. *Restraint and Coercion*

In August 1969,[1] the employees at petitioner's department store in Moses Lake, Washington,[2] became concerned over the prospect of polygraph testing respecting suspected pilfering and met to discuss the matter (R. 15; Tr. 264, 233).[3] Having received information about the meeting and the employee unrest, store owner Doris Connelly visited the store in an attempt to calm the employees (R. 15; Tr. 364, 257, 236). Apparently not assuaged by this visit, the employees met again on September 2 to discuss their problems (R. 15; Tr. 15, 258). Another meeting was held the following night with

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[1] All events occurred in 1969.

[2] Petitioner has a second store in Moscow, Idaho, about 100 miles away.

[3] "R." references are to Volume I of the record in the court below; "Tr." references are to the transcript of testimony in Volume II of that record; and references designated "GCX" or "RX" are to the exhibits of the General Counsel and the Respondent, respectively.

a representative from the Retail Clerks Union, Arnold Needham. Needham collected signed authorization cards from twenty-two employees that night, and obtained six more signed cards between September 4 and 9 (R. 16; Tr. 135, 139, 141; GCX 7A-V, GCX 9A-I).

On September 4, Connelly received a report about the meetings and told Store Manager Ehart and his assistant, Banks, that if the store were unionized she would close it (R. 17; Tr. 105-106, 348). She also told Ehart not to accept any demand from the Union (R. 25; Tr. 79). That same day, Buchanan, office manager of petitioner's Moscow, Idaho store, telephoned her assistant at Moses Lake, employee Ilse Iliff, and questioned her about the Union. When Iliff offered no information, Buchanan said, "There was a meeting last night," and added that she had "heard that most of the girls who were in attendance had signed cards" (R. 21; Tr. 163). Iliff still refused to admit any knowledge of union activities, and when asked "Did you sign?" falsely stated that she had not (Tr. 163). The conversation ended shortly after Buchanan announced that she was "very anti-union" (Tr. 164).

On September 6, Terri Clevenger, a management consultant sent by Connelly, arrived at Moses Lake and addressed meetings of employees (R. 16-17; Tr. 360, 361, 166, 95, 96). Clevenger stated that she wanted to find out "how everybody felt," that there were "questions coming up about raises," and that she "wanted [the employees] to be happy." She asked if they "had anything bothering [them] or that [they] would like to have done" (R. 17; Tr. 319, 168, 314, 221, 220). An employee inquired if a five-day week could be substituted for the six-day week and Clevenger replied that she "didn't know why not" (R. 20; Tr. 220).

Clevenger then went to Moscow to report to Connelly (R. 17; Tr. 317). About this time, the Company posted a notice at Moses Lake that the polygraph tests had been postponed (R. 17; Tr. 258-259).

On September 9, Clevenger returned to Moses Lake and met with department heads[4] to discuss the continuing employee unrest (R. 17; R. 406, 396). Clevenger announced, "the fat is in the fire. I just got word from Moscow * * * the doors will close if this Union deal goes through" (R. 17; Tr. 267). It was decided that the department heads would immediately solicit letters from employees repudiating their union authorization cards, and they did so (Tr. 273, 212, 219, 243-244, 247-248, 271, 275, 283-284, 294-295, 326, 403-405). One department head, Roberts, told employees that Connelly would close the store unless they wrote withdrawal letters (Tr. 212, 245, 260, 261, 219). Although only 28 employees had signed cards, 35 wrote letters to the Union stating they no longer wished it to represent them (GCX 8A-II). At the direction of a department head, employees delivered the letters to the Union (R. 18; Tr. 142, 112).

Shortly thereafter, employees who worked six days a week were rescheduled to five, although they continued to work forty hours (R. 18; Tr. 222-223). In paychecks distributed in the middle of September, 19 employees received wage increases. All but one of these employees had either written a withdrawal letter or had never signed a union card (GCX 3, GCX 8A-II).

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[4] Eloise Lehman, an employee, attended the meeting as a substitute for her department head (Tr. 265, 266).

2. *The discharge of Employee Iliff*

Ilse Iliff was an outspoken employee and had feuded with Store Manager Ehart since November 1968 (Tr. 171). On August 26, during the employee unrest over the polygraph testing, Iliff told Ehart that she wished to visit Connelly in Moscow to talk over employee grievances because Ehart was just "a puppet on a string" (R. 21; Tr. 172). Ehart pressed her for an explanation of the problems, but, when she responded, he accused her of trying to "run his business" (R. 21; Tr. 173). As set forth above, as soon as the Company learned of the meetings at Moses Lake, Iliff was interrogated by her superior, Buchanan, about the union activities, and Iliff refused to furnish any information. On Monday, September 8, four days after this interrogation, Iliff was abruptly discharged (R. 22; Tr. 191).

3. *The refusal to bargain*

On September 15, Union agent Needham visited the Moses Lake store and gave Manager Ehart a sealed envelope containing the Union's demand for recognition. When Ehart refused to accept it, Needham placed it on his desk and left (R. 24-25; Tr. 92, 81). Ehart then telephoned Connelly in Clevenger's presence. Pursuant to Connelly's instructions, Clevenger opened the letter, and read it to Connelly. The letter claimed that the Union represented a majority of the employees in the unit specified, offered to submit the Union's cards to a neutral person for checking, and proposed a meeting for September 25. The Company made no response to the letter, but filed a representation petition with the Board, alleging the existence of a question concerning representation. (R. 13, 25; Tr. 116, 94; GCX 6, RX 1.)

The Union had obtained 25 valid authorization cards in a unit admitted by the Company to be appropriate (R. 11; GCX 2). There were between 38 and 41 employees in the unit at all relevant times (R. 11; Tr. 24; GCX 2).

B. The Decisions Below

Upon the foregoing facts the Board concluded that the Company violated Section 8(a)(1) of the Act by coercively interrogating employee Ilse Iliff (Pet. App. B, pp. 61-62); threatening to close the Moses Lake store if the Union should prevail (Pet. App. B, pp. 62-63); soliciting, encouraging, and aiding its employees to revoke their Union authorization cards (Pet. App. B, pp. 63-64); and increasing wages and improving working hours to induce its employees to leave the Union (Pet. App. B, pp. 64-66). The Board also found that the Company violated Section 8(a)(3) and (1) by discriminatorily discharging Ilse Iliff because of her interest in and sympathies for the Union (Pet. App. B, pp. 68-70). Finally, the Board concluded that the Union had cards from a majority of the employees at the time of its recognition demand, that the Company's other unfair labor practices made a fair election unlikely, and that thus the Company violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union (Pet. App. B, pp. 74-75).

The Board ordered the Company to cease and desist from the unfair labor practices found, and to offer reinstatement to Iliff and make her whole for any loss of earnings. The Board also directed the Company to bargain with the Union upon request and to post the customary notices (Pet. App. B, pp. 76-79).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. A, pp. 37-44).

ARGUMENT

The only issue actually presented by the petition is whether substantial evidence supports the Board's unfair labor practice findings. That factual issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 491. In any event, the facts summarized above (pp. 2-6) show that there is ample basis for the Board's findings.

There is no merit to petitioner's contention that the court below misapplied the *Universal Camera* reviewing standard. The discharge of employee Iliff, unlike the hiring of temporary replacements in *National Labor Relations Board* v. *Brown Food Store,* 380 U.S. 278 (Pet. 20-21), was found by the Board and the court below to have been motivated by anti-union considerations. Action so motivated is "demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act" (380 U.S. at 286).

Nor is there any inconsistency between the statement in *Universal Camera* that a reviewing court may not "displace the Board's choice between two fairly conflicting views" (340 U.S. at 488), and the requirement in Section 10(c) of the Act, 29 U.S.C. 160(c), that the Board must be satisfied, "upon the preponderance of the testimony taken," that an unfair labor practice has been committed (Pet. 24-25). "Preponderance of the testimony" is the test which the General Counsel of the Board must meet in establishing an unfair labor practice before the Board. But if the Board is satisfied

that this test has been met and finds an unfair labor practice, Section 10(e) of the Act, 29 U.S.C. 160(e), provides that, insofar as the reviewing court is concerned, the "findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Under the latter standard, "a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.*" *Universal Camera, supra,* 340 U.S. at 488.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1973.

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[5] Petitioner's due process contention (Pet. 33) is likewise insubstantial. The Trial Examiner, whose finding the Board adopted, concluded that, "[a]lthough the complaint does not expressly allege that Clevenger was one of those who made the threat, I find that the issue was fully litigated" (Pet. App. B, p. 63, n. 11).